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INDEX-DIGEST

TO THE

CALIFORNIA REPORTS.

VOLUMES 68 TO 87 INCLUSIVE.

[SUPPLEMENTING GRAY'S INDEX-DIGEST OF VOLUMES 1-67.]

BY

A. BURROWS,
OF THE CALIFORNIA BAR.

SAN FRANCISCO:
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PREFACE.

IN this work an attempt has been made to construct an Index-Digest of the decisions in volumes 68 to 87, inclusive, of California Reports, on the plan of giving to each decision the space that its general importance seems to deserve. Those decisions which for one reason or another are of no great importance are rigorously compressed, while the important ones are more fully digested. This plan is beyond all doubt correct in theory, but whether or not it is successfully carried out herein remains to be decided by the profession. As is apparent, the work is intended to be supplementary to the Index-Digest of Mr. Gear. A table of cases is added, which will prove convenient to the practitioner.

A. BURROWS.

GRASS VALLEY, July 1, 1891.

AN INDEX-DIGEST

OF THE

CALIFORNIA REPORTS,

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A statement on motion for a new trial which does not appear to have been filed after the settlement can form no part of the record on appeal. 86 Cal. 235.

It is improper to make the evidence in one transcript part of the record in another transcript, even by stipulation. 84 Cal. 12.

A transcript containing many erasures noted in certificate will be disregarded. 79 Cal. 561.

Where there is inexcusable delay in filing transcript, and it appears that the time has passed for preparing and serving a bill of exceptions or statement, the appeal will be dismissed. 84 Cal. 537.

The fact that cases were consolidated for trial, but heard on separate appeals, will not entitle them to be considered together on appeal. 86 Cal. 617.

An appeal from an order relating to a nonsuit will be heard on record matter alone. 86 Cal. 78.

IV. APPEALABLE ORDERS.

Appealability of an order, how determined. 75 Cal. 419.

In probate cases. 73 Cal. 202; 82 Cal. 160; 86 Cal. 58.

A judgment in the nature of *quo warranta*. 79 Cal. 105.

An order granting a writ of assistance. 82 Cal. 35.

An order refusing a new trial, even before judgment is entered. 71 Cal. 399.

An order directing an executor to mortgage real property. 74 Cal. 217.

An order setting aside information and discharging defendant. 68 Cal. 500.

An order denying motion for a new trial in contest as to probate of will. 68 Cal. 132.

Any part of a final decree. 83 Cal. 574.

A judgment in a contest over a county office. 79 Cal. 477.

An order granting or refusing a new trial, even when the motion is irregular. 71 Cal. 423.

An order setting aside a default is appealable. 83 Cal. 643.

Certain probate appeals can only be taken as mentioned in section 963 of the Code of Civil Procedure. 86 Cal. 58.

An order requiring a husband to pay his wife twenty-five dollars per month is an appealable order. 86 Cal. 132.

An order settling the account of an executor is appealable. 87 Cal. 480.

V. ORDERS NOT APPEALABLE.

When the judgment or order is itself appealable, an order refusing to set it aside is not appealable. 74 Cal. 49; 76 Cal. 323; 80 Cal. 409.

Final orders in special probate proceedings. 70 Cal. 147; 72 Cal. 576; 73 Cal. 202; 82 Cal. 160.

An order refusing a nonsuit. 82 Cal. 604; 89 Cal. 71.

An order refusing to vacate a judgment. 69 Cal. 572.

An order allowing judgment on the pleadings. 83 Cal. 7.

An order denying a motion to vacate an order refusing to transfer a case to the federal court. 69 Cal. 631.

A judgment before it is entered. 69 Cal. 71.

An order dissolving a preliminary injunction not embodied in the transcript. 69 Cal. 71.

An order denying a motion for arrest of judgment. 83 Cal. 374.

An order dismissing proceedings for contempt. 70 Cal. 210.

An order dismissing a criminal action. 71 Cal. 546.

An order directing an accounting by a trustee. 71 Cal. 513.

A judgment that has been entered for over one year. 71 Cal. 335; 71 Cal. 493.

An order refusing to compel the clerk to pay over funds of an estate. 72 Cal. 578.

An order settling the account of an administrator before it is entered on the minutes. 72 Cal. 577.

An order appointing a special administrator. 73 Cal. 202.

A judgment modified as directed by the supreme court. 73 Cal. 240.

A judgment by consent. 73 Cal. 297; 82 Cal. 275.

An order made at request of appellant. 74 Cal. 536.

An order directing an insolvent to verify his schedule. 74 Cal. 381.

An order refusing to set aside a judgment or order itself appealable. 74 Cal. 49.

An order deciding who is entitled to a legacy in advance of an order of distribution. 78 Cal. 136. But see 81 Cal. 571.

A judgment or order of nonsuit. 69 Cal. 71.

An order striking out an amended complaint. 76 Cal. 299; 78 Cal. 358.

A decree of distribution entered for sixty days. 75 Cal. 523; so of any interlocutory decree in partition. 77 Cal. 609; or of a new-trial order. 81 Cal. 214.

An order refusing to remove an administrator. 68 Cal. 394.

A separate order before judgment, in a divorce case, allowing \$150 as counsel fees, because too small in amount to give the court jurisdiction. 83 Cal. 618.

An order striking out a complaint. 84 Cal. 528.

VI. QUESTIONS CONSIDERED ON APPEAL.

Whether findings of fact warrant the conclusion of law. 68 Cal. 374.

Error being shown, injury will be presumed, unless the presumption is rebutted. 71 Cal. 513.

Errors which appear in the judgment, but might also have appeared by the bill of exceptions, will be considered on appeal. 73 Cal. 599.

Error in granting a nonsuit is an error of law, and will be reviewed on appeal from an order refusing a new trial, if excepted to on the trial, and specified as error in the statement, or bill of exceptions. 74 Cal. 459.

Appealability of an order, how determined. 75 Cal. 419.

Error in overruling demurrer will be reviewed on appeal from judgment, and not on an appeal from an order denying a new trial. 76 Cal. 8.

An order refusing a nonsuit, duly excepted to, is reviewable on appeal from the judgment. 82 Cal. 604.

A judgment on the pleadings. 73 Cal. 599.

When the findings are correct, but the judgment for defendant erroneous, judgment may be ordered for the plaintiff, if he waives damages. 84 Cal. 554.

Cases in which judgment will not be merely modified on appeal. 84 Cal. 98.

VII. QUESTIONS NOT CONSIDERED ON APPEAL.

An order refusing a new trial in which the judgment roll is not embodied in the transcript. 69 Cal. 71.

Sufficiency of evidence, when the statement does not specify the errors of fact. 68 Cal. 374; 76 Cal. 8; 77 Cal. 217.

A notice of intention to move for a new trial, unless inserted in statement or bill of exceptions. 69 Cal. 112.

Sufficiency of evidence to sustain a verdict, when the statement does not specify wherein. 69 Cal. 643.

An objection to evidence not excepted to at trial. 68 Cal. 618; 70 Cal. 534.

An appeal taken by the same party on the same judgment, while another valid appeal is pending. 70 Cal. 337. But an unperfected appeal is not such. 71 Cal. 455.

An order which does not affect the appeal.

lant, so as to render him an "aggrieved party." 83 Cal. 420.

Affidavits used on motion for new trial, not incorporated in exceptions or statement, or identified by the judge. 71 Cal. 428.

An appeal from the judgment not taken within a year from entry. 71 Cal. 335; 71 Cal. 493.

An order changing the place of trial, where the grounds of the motion are not properly authenticated. 83 Cal. 490.

An appeal from a judgment will be dismissed, where the notice of appeal is both filed and served before the judgment is entered, but in such case a fraction of a day will not be considered. 72 Cal. 192.

Affidavits not embodied in the transcript which are not identified. 77 Cal. 326.

Evidence omitted from the statement, through ignorance, negligence, or mistake. 77 Cal. 352.

A respondent cannot demand a reversal or modification of a judgment. 73 Cal. 249.

When the evidence is conflicting, a judgment will not be disturbed. 77 Cal. 588; 81 Cal. 280.

Error in admitting evidence, where there is abundant other evidence on the same point. 77 Cal. 579.

Errors not injurious to appellant, but to his co-defendant. 73 Cal. 193.

Volunteer evidence not excepted to. 77 Cal. 449.

That the findings do not support the conclusions, cannot be considered on appeal from an order refusing to grant a new trial. 73 Cal. 394.

An order striking out an amended complaint, except on appeal from the judgment. 78 Cal. 358; 76 Cal. 299.

When there is no oral argument or brief, by appellant, the judgment or order appealed from will be affirmed. 78 Cal. 624.

When a motion has been denied, its renewal upon the same ground, without leave, will not be entertained. 78 Cal. 470.

Want of preponderance of evidence is not sufficient ground for reversal. 78 Cal. 341; 78 Cal. 15; 79 Cal. 187; 82 Cal. 529; 82 Cal. 88; 81 Cal. 280; 80 Cal. 166; 82 Cal. 275; 83 Cal. 559; 83 Cal. 198; even as to verdict. 79 Cal. 313; 83 Cal. 629.

Injury to a third person, not connected with appellant, will not be considered. 78 Cal. 144.

The appointment of a guardian *ad litem*, when the appeal is on the judgment roll, will not be considered. 79 Cal. 268.

A motion to dismiss an appeal, invalid for want of an undertaking in time, will not be considered. 80 Cal. 61.

When the appellant fails to point out any error, the court will not search the record for the purpose of discovering one. 80 Cal. 20.

The merits of the appeal cannot be con-

sidered on a motion to dismiss. 83 Cal. 564.

The sufficiency of cause for granting a new trial for insufficiency of evidence will rarely be considered. 82 Cal. 278.

A statement on motion for a new trial, excepting to the sufficiency of evidence, cannot be considered, if the appeal was not taken within sixty days from the rendition of the judgment. 81 Cal. 244.

When a cause is submitted on briefs, points not made in the opening brief may be considered as waived. 74 Cal. 11.

The insufficiency of the evidence will not be considered when the appeal is not taken within sixty days of the rendition (not "entry") of the judgment. 69 Cal. 202; 74 Cal. 269; 75 Cal. 496; 76 Cal. 258; 76 Cal. 381; 80 Cal. 74; 81 Cal. 244; 81 Cal. 214.

Errors in admitting testimony will not be considered unless such evidence appears in the record. 85 Cal. 515.

But one statement of a case is authorized, and none other will be considered on appeal. 86 Cal. 643.

A statement served long after the time allowed by law or stipulation will not be considered on appeal. 86 Cal. 643.

An order granting a nonsuit cannot be reviewed on appeal, if no exception was taken to the ruling, as an error of law, at the time thereof. 86 Cal. 211.

Exceptions to the oral charge of the court will not be considered which did not specifically point out the portions excepted to at the time. 76 Cal. 192.

An objection to the right of intervenor to intervene, raised for the first time on appeal, will not be considered. 76 Cal. 269.

Where the evidence is substantially conflicting, the supreme court cannot disturb the verdict on the ground that it was against the evidence. 84 Cal. 639.

When the evidence is conflicting, the findings or verdict will not be disturbed. 87 Cal. 290; 87 Cal. 441; 87 Cal. 413; 87 Cal. 104.

A finding will not be disturbed when other findings render the issue immaterial. 87 Cal. 413.

A judgment will not be reversed because immaterial findings were not supported by the evidence. 87 Cal. 643.

Where the record shows that the appellant is not entitled to recover in any event, error in the admission of evidence will not be considered on appeal. 87 Cal. 115.

The ruling of a court in granting a nonsuit will not be reviewed without a bill of exceptions specifying the ruling of the court as error. 87 Cal. 410.

A rehearing in the supreme court will not be granted in order to consider points not made in the argument upon which the case was submitted. 87 Cal. 192.

An objection to the form of the verdict on

the ground of its uncertainty cannot be raised for the first time on appeal. 87 Cal. 345.

An objection that an answer alleging fraud is too general cannot be urged for the first time on appeal. 87 Cal. 399.

Error in instructing a jury in an equity case. 85 Cal. 205.

VIII. BILL OF EXCEPTIONS.

Presumed to contain all the evidence tending to explain the ruling excepted to. 68 Cal. 590. But see 80 Cal. 504.

In an appeal on the judgment, an intermediate non-appealable order can only be reviewed by bill of exceptions. 80 Cal. 564.

A bill of exceptions is the proper and only mode for authenticating affidavits used upon an order. 81 Cal. 608; 81 Cal. 261.

A bill of exceptions is to be preferred to a statement of the case, as a simple and convenient mode of preserving exceptions, and bringing up the evidence on appeal, in all kinds of appeals. 81 Cal. 634.

A bill of exceptions may be settled, even after appeal from the judgment. 72 Cal. 197.

Section 648 of the Code of Civil Procedure has no application to intermediate non-appealable orders affecting the judgment reviewable under section 956 of the Code of Civil Procedure. 84 Cal. 528.

IX. DISMISSAL OF APPEAL.

Motion for dismissal must be made on day noticed for hearing, or at first opportunity during session. 68 Cal. 521.

Appeal will not be dismissed for failure to file in time, contrary to stipulation, even though the stipulation was not filed. 68 Cal. 235.

A dismissal for want of service of notice on alleged adverse party refused, because it could not be determined without inquiry into the merits. 83 Cal. 564.

Appellant is entitled to forty days after settlement of bill of exceptions to file transcript. 71 Cal. 453.

Appeal from a judgment not taken within a year from its entry will be dismissed. 71 Cal. 335; 71 Cal. 493; 84 Cal. 168.

An appeal will be dismissed for failure to file transcript within forty days, though a motion for a new trial is pending. 71 Cal. 404. See 84 Cal. 537.

Order for an extension of time duly rendered, but not filed, will bar dismissal. 71 Cal. 329.

Stipulation showing consent to dismissal must be in due form. 72 Cal. 161.

The district attorney, and not his special assistant, has the right to dismiss an appeal prosecuted by a county. 72 Cal. 450.

Appeal will not be dismissed for want of service on adverse parties not interested. 78 Cal. 232.

Where a respondent dies, his representative cannot move to dismiss, until substituted as party. 72 Cal. 85.

No one but a party aggrieved has the right to appeal. 83 Cal. 420.

An appeal will be dismissed when the notice thereof has not been served on all parties that might be affected thereby. 68 Cal. 189; 69 Cal. 80; 73 Cal. 437.

Where there is no appearance, or points and authorities on file, the appeal will be dismissed. 73 Cal. 190.

An appeal from a judgment not taken within a year will be dismissed. 75 Cal. 349; 75 Cal. 426; 76 Cal. 8; 77 Cal. 525; 79 Cal. 23.

An appeal from a decree of distribution not taken within sixty days will be dismissed. 75 Cal. 523.

If there is no oral argument, and no brief on file in time, a brief filed without leave of court will not be considered, as to any technical point. 75 Cal. 298.

An appeal from a judgment before it is entered will be dismissed. 75 Cal. 534.

Failure to show proper notice of appeal will cause the appeal to be dismissed. 76 Cal. 376.

Appeal from an interlocutory decree in partition must be taken within sixty days. 77 Cal. 609.

An appeal from an order declaring who is entitled to a legacy will be dismissed. 78 Cal. 133.

When the transcript on appeal is unintelligible the appeal will be dismissed. 78 Cal. 509.

A stipulation to dismiss will be considered on motion to dismiss. 78 Cal. 645.

An appeal will be dismissed where the judgment has been satisfied. 78 Cal. 645.

Absence from the record of notice of intention to move for a new trial, or of motion therefor, is not ground for dismissal. 78 Cal. 384; 79 Cal. 140.

An appeal which does not show service of notice, or contain a certificate identifying papers, will be dismissed. 79 Cal. 185.

The court will dismiss for non-compliance with its rules as to arrangement of transcript of its own motion. 79 Cal. 612.

Failure to file an undertaking in time is not ground for dismissal, because there is really no appeal. 80 Cal. 61.

The dismissal of an appeal because prematurely taken is no bar to a second appeal. 80 Cal. 166.

An appeal may be dismissed "without prejudice" so as to permit of a second appeal, regardless of the remittitur. 80 Cal. 626.

An appeal of defendant cannot be dismissed because the counterclaim does not exceed three hundred dollars; the test of jurisdiction in the superior court is the test of the right of appeal. 81 Cal. 596.

An appeal from the judgment upon a petition to establish the right of inheritance, under section 1664 of the Code of Civil Procedure, must be made within sixty days from entry, or will be dismissed. 81 Cal. 571.

An appeal from a new-trial order taken more than sixty days after the entry will be dismissed. 81 Cal. 214.

The court will dismiss an appeal in which it has no jurisdiction, of its own motion. 82 Cal. 425.

A statement that the transcript is incorrect will not justify the dismissal of an appeal. 72 Cal. 579.

Where the appellant moves to dismiss his own appeal, the question whether the dismissal is sought to defraud the assignee of respondent cannot be tried. 83 Cal. 588.

An appeal taken before the judgment is entered is premature, and leaves the cause in the court below as undisturbed as though no appeal had been attempted. 84 Cal. 486.

An appeal from a new-trial order will be dismissed, where the notice of intention was not served on the proper attorney. 86 Cal. 580.

An appeal will not be dismissed for laches where both parties are guilty of laches. 86 Cal. 149.

Where an undertaking is not waived or filed within proper time, the appeal must be dismissed. In such case the right of appeal is lost, and cannot be revived by stipulation. 87 Cal. 241.

An appeal will be dismissed under rule 3 of the supreme court, where the transcript is not filed in time, although the transcript was filed a few hours later on the same day when the notice of motion was given. 87 Cal. 610.

In matters where rights accrue from the priority of acts, courts will take cognizance of fractions of a day. 87 Cal. 610.

An appeal will be dismissed for delay in filing transcript, even though a statement on motion for a new trial which is to be used on the appeal remains unsettled, if it appears that the judge has properly refused to settle the statement, and that there can be no statement on appeal. 87 Cal. 370.

When a judgment has been satisfied, it is passed beyond review, and an appeal therefrom will be dismissed. In such case the judgment cannot be revived by agreement. 87 Cal. 200.

A motion to dismiss for insufficiency of undertaking will be denied, where there is nothing to contradict the clerk's certificate that a sufficient undertaking on appeal in due form was properly filed. 87 Cal. 256.

X. APPEALS, GENERALLY.

Papers may be identified by certificate of judge, and such certificate may be supplied after appeal. 70 Cal. 72.

A statement on motion for new trial may be used in support of appeal from the judgment, and its transcript on such appeal may be filed in forty days after the settlement of such statement. 83 Cal. 621.

An appeal will not be dismissed for failure to file transcript, if the time has been extended by four justices. 83 Cal. 134.

The decision of the court on the same case in a previous appeal is the "law of the case," even though the evidence is different, to an immaterial extent. 84 Cal. 541; 83 Cal. 415.

A finding for plaintiff contrary to his complaint, self-contradictory, and not supported by evidence, will be disregarded on appeal. 83 Cal. 521.

Pending an appeal a judgment cannot be amended. 72 Cal. 161.

A bill of exceptions may be settled after appeal from the judgment. 72 Cal. 197.

Objections that a motion for a new trial was not in time must be first raised at the settlement or hearing of motion. 72 Cal. 535.

An appeal from an order refusing an injunction is heard upon the papers used on the hearing in the lower court. 75 Cal. 620.

It will not be presumed on an appeal that a judgment was "improvidently or unintentionally" made, and therefore properly set aside; such facts must be shown positively. 75 Cal. 617.

Dicta which cover the point in the case become the law of the case. 75 Cal. 265.

When there is nothing in the record to the contrary, the presumption is, that the court below ruled correctly. 76 Cal. 621. But see 75 Cal. 617.

The right of the parties to appeal dates from the actual entry of the judgment, and not by the entry of a judgment *nunc pro tunc*. 76 Cal. 354.

An order sustaining a demurrer on several grounds will not be reversed, if any of them is well taken. 76 Cal. 29.

The question whether other parties should have been made parties in a motion for a new trial is not involved in a motion to dismiss the appeal. 77 Cal. 609.

Errors of law, although not particularly specified, will be reviewed when the appeal is taken on bill of exceptions. 76 Cal. 355.

An order striking out part of complaint may be reviewed on an appeal from the judgment through a bill of exceptions. 76 Cal. 299.

A record on appeal from an order refusing a new trial should contain a notice of intention to move for a new trial; but if the statement is stipulated to be correct, such notice will be presumed to have been given, or waived. 76 Cal. 192.

It will be presumed that the court below acted correctly, unless the record shows the contrary. 77 Cal. 50; 77 Cal. 579; 77 Cal. 150; 80 Cal. 122. See 75 Cal. 617; 79 Cal. 517.

An interlocutory decree, except in partition, is not appealable. 77 Cal. 609.

Failure to file transcript in time may be excused by affidavits showing mistake or excusable neglect. 77 Cal. 64.

Every decision must be construed in accordance with the facts of the case. 78 Cal. 443.

All errors are presumed to work injury, unless it clearly appears to the contrary. 78 Cal. 283; 78 Cal. 289; 79 Cal. 517.

Notice of intention to move for a new trial is not part of the record on appeal. 78 Cal. 384; 89 Cal. 112; 74 Cal. 269; 79 Cal. 268; except when shown by a bill of exceptions. 78 Cal. 385.

An order granting a new trial for insufficiency of evidence will not be reversed, unless there was an abuse of discretion. 79 Cal. 340.

A judgment may be modified on appeal to conform to the findings. 79 Cal. 439.

A judgment may be modified by decreasing damages, or granting a new trial. 79 Cal. 317.

An exhibit may be incorporated in the statement by way of appendix, duly identified. 79 Cal. 633.

In such cases the certificate of the judge held sufficient. 79 Cal. 633.

A statement may refer to depositions, by using the words "here insert" at the proper place, to be copied in full in the transcript. 79 Cal. 633.

A decision on an appeal from the judgment is not "the law of the case," on an appeal from an order refusing a new trial in the same case. 79 Cal. 633. See 84 Cal. 149.

When the findings on a second appeal are not the same as on the first appeal, the doctrine of the "law of the case" will not apply. 79 Cal. 258; otherwise if the facts are substantially the same. 79 Cal. 490.

An appeal taken on a question of priority of lien cannot unsettle the title obtained under the foreclosure sale. 79 Cal. 297.

Appellant's brief ought not to reflect on the trial judge. 79 Cal. 404.

Damages will be awarded where the appeal is evidently taken for delay. 79 Cal. 409; 82 Cal. 635.

A case on appeal should be entitled, in accordance with the long-settled practice of the court. 79 Cal. 563.

It is not error to exclude a question to a witness where the answer does not appear material. 80 Cal. 417.

The doctrine of the "law of the case" will be strictly construed; it does not apply to erroneous expressions of opinion, which are merely *dicta*. 80 Cal. 383; nor to a new state of facts. 82 Cal. 250.

An order will not be held erroneous where the records fail to show the grounds on which it was made. 80 Cal. 243.

If the record does not show findings, a waiver thereof will be presumed. 80 Cal. 410.

Error in granting a motion must appear affirmatively in the record. 80 Cal. 472.

A decision is not even authority except on the point actually passed on by the court and directly involved in the case. 84 Cal. 149.

Appeal from any decision after judgment can only be by bill of exceptions. 80 Cal. 472.

Where the bill of exceptions does not purport to contain all the evidence, an error in the admission of the evidence cannot be held prejudicial on appeal. 80 Cal. 504.

For an appeal taken for delay, damages will be given regardless of the good faith of the attorney. 80 Cal. 609.

He who objects because there was no guardian *ad litem* must show, in addition, that his objections were well founded. 84 Cal. 489.

It is too late to ask for a modification of a judgment after the *remittitur* has gone down. 84 Cal. 590.

When a judgment is affirmed on conditions, the performance of such conditions operates as an affirmation. 84 Cal. 590.

Where an appeal from a judgment foreclosing a mechanic's lien is dismissed, additional attorney's fees will be ordered allowed for the appeal. 84 Cal. 537.

When a party to a suit dies, but was not affected by an appeal, substitution is unnecessary. 81 Cal. 641.

Notice of the intention to move for a new trial is no part of the record on appeal. 79 Cal. 364.

Creditors of an insolvent may jointly prosecute an appeal if all are aggrieved. 81 Cal. 364.

Points decided on a former appeal become the law of the case, in so far as the facts are the same. 85 Cal. 1; 85 Cal. 390.

The failure of an appellant to file his points and authorities in time is not ground that the judgment be affirmed, regardless of the merits. 85 Cal. 218.

The authentication of certain affidavits mentioned in a bill of exceptions held sufficient. 85 Cal. 609.

When a case has been thoroughly tried, and it appears that judgment should have been for the appellant, the court below will be directed to render a judgment for him. 85 Cal. 251.

Error in granting a nonsuit is an error of law, and if excepted to, may be reviewed without any specification as to the insufficiency of the evidence. 85 Cal. 522.

Where the evidence is conflicting, that portion of it that supports the judgment will be assumed to be true. 85 Cal. 102.

When there is evidence to support a verdict, the judgment will not be disturbed on the ground of its insufficiency. 85 Cal. 61.

A preponderance of evidence is always sufficient to sustain a verdict. 85 Cal. 434.

The ruling of a court upon evidence cannot be considered, unless duly excepted to. 85 Cal. 515.

Where evidence is improperly admitted against objections, the presumption is, that the court attached some importance to it, and that the error was prejudicial, and is ground for a new trial. 85 Cal. 304.

The fact that there is no finding upon a material issue may be considered on appeal, where one of the grounds given in the notice of motion for a new trial is that the decision is against law. 85 Cal. 155.

Error must be affirmatively shown by the appellant. 85 Cal. 542.

Error in instructing a jury in an equity case is immaterial. 85 Cal. 205.

A verdict will not be disturbed on appeal where the evidence is conflicting. 85 Cal. 291.

An order setting aside a judgment will not be reversed on appeal, unless it appears that the court abused its discretion. 85 Cal. 116.

Where a complaint is set forth in three counts, but there is only one cause of action, a judgment upon one count renders a judgment upon the others superfluous. 86 Cal. 176.

If a clerical error appears in the judgment, the court will order the judgment corrected without costs. 81 Cal. 625.

Supreme court has no jurisdiction to hear appeal from a judgment of a superior court on *certiorari*, as to the judgment of a justice's court. 82 Cal. 425.

Whenever there are no specifications in the statement as to the insufficiency of evidence, and no errors of law, an order refusing a new trial will be affirmed. 82 Cal. 483.

Where a double appeal is taken with a stipulation that the appeal may be heard in both cases on the same record, the transcript may be examined without further identification. 87 Cal. 483.

The ruling on a motion for a nonsuit, if excepted to, is a "decision," from which an appeal must be taken within sixty days. 87 Cal. 410.

Where a nonsuit is granted, the decision of the court will be upheld if the ruling can be justified on any ground whatever. 87 Cal. 410.

A judgment cannot be modified on appeal where new findings are required. The appellate court cannot make findings for the court below, but can only reverse the judgment. 87 Cal. 49.

The failure of the judge to file his decision within thirty days after the case is submitted is not ground for a new trial. 87 Cal. 569.

An order granting a new trial will be re-

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versed as readily as an order refusing it, if granted through a misapprehension of law. 87 Cal. 425.

See BILL OF EXCEPTIONS; NEW TRIAL; JURISDICTION.

APPEARANCE.

Want of jurisdiction over the subject-matter is not waived by appearance. 70 Cal. 564.

Appearance, or service of summons, is necessary to jurisdiction. 75 Cal. 237.

Appearance by an unauthorized attorney held not prejudicial when a default would be taken without such appearance. 71 Cal. 504.

As a waiver of technical defects. 72 Cal. 513; 70 Cal. 527.

A special appearance of defendant by motion to strike out complaint or to extend time to plead is not a waiver of summons. 75 Cal. 237.

Appearance of general guardian sufficient for jurisdiction in partition. 80 Cal. 491.

APPROPRIATION.

For traveling expenses of surveyor-general and attorney-general. 69 Cal. 223.

For official salaries. 84 Cal. 57.

For salary of deputy supreme court reporter. 69 Cal. 75.

For drainage claims. 69 Cal. 462.

For aged and indigent persons. 69 Cal. 73; 77 Cal. 133.

The legislature has no power to increase the back salary of its employees. 77 Cal. 473.

For mining bureau. 80 Cal. 220.

See BONDS; CONSTITUTIONAL LAW; STATUTES; WATER RIGHTS.

ARBITRATION.

Agreement for arbitration no bar to statute of limitation. 70 Cal. 414.

Admission for arbitration not evidence in collateral matters. 71 Cal. 515.

Arbitrators, under section 1610 of the Civil Code, are not governed by the law as to arbitrators. 74 Cal. 296.

Submission of a cause to arbitration operates as a dismissal. 76 Cal. 378.

Power of arbitrators. 80 Cal. 118.

Revocation of stipulation for. 82 Cal. 42.

ARRAIGNMENT.

See CRIMINAL LAW.

ARREST (CIVIL).

An affidavit for arrest in a justice's court case held insufficient. 86 Cal. 70.

An affidavit for arrest must state the facts constituting the offense directly, and not upon information or belief. 86 Cal. 70.

A defendant in a civil act on held in custody under the order of arrest, based upon an insufficient affidavit, will be discharged on *habeas corpus*. 86 Cal. 70.

ARREST OF JUDGMENT.

See CRIMINAL LAW.

ARSON.

See CRIMINAL LAW.

ARTICLES OF INCORPORATION.

See CORPORATIONS.

ASSAULT.

See CRIMINAL LAW.

ASSAULT TO MURDER.

See CRIMINAL LAW.

ASSENT.

See ACQUIESCENCE.

ASSESSMENT.

: See CORPORATION; STREET ASSESSMENT; TAXATION.

ASSIGNMENT.

Assignment of claim to attorney is not evidence that he bought it with intent to bring suit. 68 Cal. 80.

The assignee of a partnership account is not barred from bringing a suit by the failure to publish certificate of copartnership. 70 Cal. 194.

An assignee of a legacy may have assigned to him his assignor's share of the estate. 71 Cal. 285.

The assignee of a person who is administrator cannot, for the benefit of such per-

son, maintain suit against administrator. 71 Cal. 193.

An assignee has all the rights to sue that his assignor had. 73 Cal. 188.

An assignee of a mortgagee may discharge the lien by entry on the margin of the record. 72 Cal. 457; but in such case the debt may remain. *Id.*

The assignment of a certificate of purchase at sheriff's sale may be made by quit-claim deed. 75 Cal. 240.

Assignment in insolvency does not include property exempt from execution. 75 Cal. 496.

An assignment of lien will be presumed to be in writing when required by law. 75 Cal. 203.

A note indorsed in blank is payable to bearer, and a mortgage securing the same follows the transfer of the note. 85 Cal. 304.

The assignee of a lease by surrendering it up discharges himself from liability for rent to the landlord. 76 Cal. 125.

If A owes a debt to B and B assigns to C, and A pays B without knowledge of the assignment, his obligation is discharged. 77 Cal. 433.

The assignment of a note after maturity is taken subject to all defenses. 81 Cal. 303.

A contract by which A agrees to sell and B to buy certain crops, to be grown, is assignable. 84 Cal. 281.

The fact that a contract for certain labor is not assignable does not make the wages non-assignable. 84 Cal. 263.

An assignment coupled with the power of attorney is evidence that the assignee has an interest in the subject, not revocable by the death of the principal. 84 Cal. 263.

The lien of the vendor who retains the title may be assigned, but the implied equitable lien in favor of a vendor who has parted with the title is purely personal, and is not assignable. 87 Cal. 619.

A deed to a portion of land held only under a contract for conveyance operates as an assignment of an interest under the contract. 87 Cal. 581.

The destruction of an agreement of assignment held not to necessarily destroy its validity. 87 Cal. 581.

An assignee of all the bailor's interest in wine converted by a factor may maintain an action for its value, although such wine was only a portion of the consignment. 87 Cal. 15.

A non-negotiable contract of purchase and sale is transferable by indorsement. 86 Cal. 574.

Where an assignor assigns a non-negotiable contract, the assignee becomes bound to perform the terms of the contract. 86 Cal. 574.

A surviving partner of a firm of attorneys may assign a debt due for services rendered by the firm. 86 Cal. 589.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

Assignee for the benefit of creditors may maintain action for cancellation of the fraudulent note of the assignor. Any written instrument which would likely cause serious injury may be the subject of a suit for its cancellation. 83 Cal. 234.

Failure of the assignee to give his bond does not affect the validity of the deed of assignment. 80 Cal. 542.

The court may order an assignee to account as often as occasion seems to require. Such order is not appealable. 73 Cal. 10.

The garnishee of the assignor may dispute the validity of the assignment. 70 Cal. 6.

The assignee may maintain a suit to cancel a fraudulent note of the assignor. 83 Cal. 234.

An assignment for benefit of creditors by a partnership is void if it gives any preference. 70 Cal. 6.

Failure of assignee to give bond does not invalidate assignment; the remedy is to have the assignee removed. 80 Cal. 542.

An assignee by the assignment becomes the "owner" as trustee. 78 Cal. 418.

An assignment for the benefit of creditors is voluntary, and neither creditors nor assignee can claim any property which was not in fact assigned to them. 78 Cal. 263.

If the debtor in bad faith omits some of his debts improperly from the inventory, the assignment is void. 85 Cal. 134.

An assignment for the benefit of creditors is governed by the law of trusts, and leaves the assignor no interest in the property except as to the residue after the satisfaction of creditors. 87 Cal. 453.

A creditor who assents to an assignment cannot sell any of the assigned property on execution, and an attempt to do so may be enjoined. 87 Cal. 453.

An insolvent may in good faith make an assignment for the benefit of creditors, with or without their consent. 87 Cal. 453.

Sufficiency of a complaint by an assignee against a creditor claiming hostile to the assignment. 87 Cal. 453.

ASSOCIATION.

See BENEFICIAL ASSOCIATION.

ASSUMPSIT.

See ACCOUNT.

ATTACHMENT.

Attachment will not lie when a lien exists, but this does not exclude attachment for

installments due for corporation stock. 83 Cal. 600.

The service of notice of preferred claims for labor, under section 1206 of the Code of Civil Procedure, may be made upon the party's attorney. 83 Cal. 222.

The regularity of the affidavit cannot be attacked collaterally by a stranger to the suit. 68 Cal. 1.

A lien of attachment accruing four months prior to bankruptcy proceedings is not affected by the discharge. 69 Cal. 516.

An attachment on land not served or levied on according to law is not an encumbrance. 71 Cal. 306; 70 Cal. 42.

Sheriff's fees for attachments in Lassen County. 73 Cal. 260.

Attachment of real property, how made. 72 Cal. 494; 71 Cal. 306.

Affidavit for attachment must not be in the alternative, and cannot be amended, and is not waived by release bond. 72 Cal. 553. It may aver "upon an account stated," or contract. 78 Cal. 175.

Return of, cannot be attacked collaterally. 72 Cal. 565.

An attachment continues no longer than the law provides; hence a judgment for defendant in a justice's court vacates the attachment, and an appeal to the superior court will not revive it. 76 Cal. 562.

An attachment debtor who settles with his creditors must pay the sheriff's fee before release. 76 Cal. 56.

Actual residence of plaintiff in the state is a prerequisite to attachment. But such residence need not be permanent. 82 Cal. 631.

Action for malicious attachment is barred in two years. 77 Cal. 208.

An unrecorded deed is good against attachment. 77 Cal. 218.

Affidavit for, need not state whether upon information and belief, and may be made by any one on behalf of plaintiff. 78 Cal. 175.

Attachment not arising on a contract express or implied is void as to all persons. 78 Cal. 34.

Attachment cannot issue in an action sounding in tort. 78 Cal. 34. See 80 Cal. 104.

Misnomer of defendant cannot affect attachment. 79 Cal. 556.

Attachment is not affected by amendment to complaint. 79 Cal. 556.

Damages upon a release bond, how measured. 79 Cal. 556.

Good faith is no defense to wrongful conversion by attachment. 79 Cal. 181.

Affidavit showing the mortgage to be "valueless" held sufficient. 84 Cal. 174.

Pledged property in the possession of the pledgor is subject to attachment by his creditors. 79 Cal. 192.

Attachment may issue for damages for breach of contract. 80 Cal. 104.

An officer's return stating that he "attached" certain property held not sufficient to show levy. 80 Cal. 462.

A cause of action from malicious attachment accrues at the date of the attachment. 80 Cal. 392.

Error as to attachment not ground for a reversal of judgment, or of order denying a new trial. 81 Cal. 636.

Property of a company in custody of a foreign receiver, brought into this state, is subject to attachment. 81 Cal. 561.

When it is shown that the debt is secured by a valid mortgage, the attachment should be dissolved. 84 Cal. 174.

Where the court orders an attachment released, the subsequent retention of the property by the sheriff is wrongful. 86 Cal. 367.

An affidavit for attachment is not required to be as particular as a pleading. 85 Cal. 386.

An attaching creditor can acquire no greater right in the attached property than the defendant had at the time of the attachment. If the property is so situated that the defendant cannot dispose of it adversely to others, it cannot be attached for his debt. 85 Cal. 488.

An attachment levied within one month prior to the filing the petition in insolvency is dissolved, and will not be revived by a dissolution of insolvency proceedings. 87 Cal. 453.

ATTORNEY.

Communication to, not by a client, not privileged. 68 Cal. 272.

Retainer against a former client is unprofessional when. 69 Cal. 32; 69 Cal. 67.

Cannot confess judgment without express authority. 69 Cal. 133.

Cannot be held for libelous matter in a complaint. 69 Cal. 625.

Verification of a pleading by an attorney discussed and construed. 78 Cal. 120.

Proceedings to disbar cannot be dismissed by accuser. 71 Cal. 584.

An attorney will be disbarred for violation of his duty to client. 71 Cal. 353.

Attorneys appointed for minor heirs during probate proceedings become, in effect, their guardians *ad litem*. 75 Cal. 596.

A motion for a new trial does not lie after disbarment. 71 Cal. 353.

Conversion of client's money sufficient cause for disbarment. 72 Cal. 359.

An attorney at law cannot change sides during the progress of a case, even in successive trials. 74 Cal. 383. To allow it is error for which a judgment will be reversed, and such conduct is cause for disbarment. 77 Cal. 357.

Amount of allowance of fees to attorney for absent heirs is in discretion of court. 75 Cal. 256.

Decision of Secretary of the Interior as evidence in contest over attorney's fees. 76 Cal. 161.

Claim for contingent fee in a case afterwards withdrawn depends on the merits thereof. 76 Cal. 113.

The measure of damages for breach of contract of employment is the full contract price. 76 Cal. 621; 79 Cal. 218.

Evidence as to the value of services, how proven. 77 Cal. 410.

An attorney for a party in an action is his agent for all its purposes, and on him all papers should be served. 83 Cal. 222.

A Mongolian, even though admitted to practice in the highest courts of a sister state, is not entitled to be admitted in the supreme court of this state. 84 Cal. 163.

Certain evidence of unprofessional conduct of an attorney who had practiced for forty years without a stain held not sufficient for disbarment. 84 Cal. 550.

It is unprofessional for an attorney to counsel proceedings which do not seem to him to be just or legal, or to encourage a criminal prosecution and then assume the defense of the accused. 84 Cal. 77; 77 Cal. 357.

An attorney may be punished by temporary suspension. 84 Cal. 77.

An attorney may be disbarred for an indefinite period, or until he performs something. 78 Cal. 307.

Attorneys have a right to read all the pleadings to the jury, and cannot be restrained by the court from discussing the case in all its bearings. 77 Cal. 410.

The authority of an attorney ceases with the death of his client. 78 Cal. 89.

Charges against attorneys need not be as formal as an indictment. 78 Cal. 417.

Attorney fees are an incident to foreclosure of mechanics' liens. 78 Cal. 450.

When compensation is contingent on obtaining a judgment, the claim does not accrue until such judgment. 80 Cal. 417.

When a lawyer acts for two persons in common, he can testify for either against the other as to their negotiations. 79 Cal. 344.

An attorney cannot compromise a case without his client's consent. If he does compromise, however, such consent will be presumed. 83 Cal. 553.

An attorney cannot be barred for the unprofessional conduct of his copartner of which he had no personal knowledge. 83 Cal. 303.

In proceedings to disbar, the accused is entitled to show by proof what is his professional reputation and character. 83 Cal. 303.

An attorney has a right to secure in advance payment for services in litigation.

though he knew at the time that the party was insolvent and was about to make an assignment for benefit of creditors. 83 Cal. 303.

Certain acts of an attorney relating to insolvent debtors held not ground for disbarment. 83 Cal. 303.

An attorney retained on a contingent fee, who refuses to fulfill his contract, is entitled to nothing. 80 Cal. 417.

An attorney for an executor cannot take part in a probate contest between the heirs. 80 Cal. 625.

Attorney fees may be ordered allowed by the superior court for services in supreme court in cases of mechanics' liens. 80 Cal. 275.

A notice to quit may be signed for the landlord by his attorney, as A B by C D, attorney. 81 Cal. 510.

When proof has been made that services have been rendered, a *prima facie* case is made out for reasonable compensation. 82 Cal. 577.

An attorney who works for a contingent fee and compromises the case must account to his client for his client's share. 82 Cal. 57.

Attorney's fees in a promissory note render it non-negotiable. 82 Cal. 636.

An attorney who has served as attorney for one side during a trial ought not to be allowed to change sides at a subsequent trial. 74 Cal. 557. To allow it is error. *Id.*

In an action on a note, the mere fact that the relation of attorney and client existed between the plaintiff and defendant, and that the claim ought to be looked upon with suspicion, is not cause to overthrow a verdict for plaintiff. 79 Cal. 224.

Service rendered by an attorney in endeavoring to have the legislature pass a bill is not lobbying or contrary to public policy. 83 Cal. 542.

A contract made by an attorney, under which he agrees to pay a person a certain percentage for procuring his employment in a particular case, held to be invalid and contrary to public policy. 86 Cal. 78.

See AGENCY; APPEAL; AFFIDAVIT OF MERITS; DIVORCE; VERIFICATION.

ATTORNEY-GENERAL.

Authority by attorney-general to use the name of the people in a suit cannot be revoked after suit begun. 72 Cal. 289.

ATTORNEY IN FACT.

See AGENCY.

ATTORNMENT.

See LANDLORD AND TENANT.

AWARD.

See ARBITRATION.

BAGGAGE.

See COMMON CARRIER.

BAILEMENT.

If a bailee who has a lien on property refuses to deliver it without setting up his lien thereon, he waives his claim of lien after suit is brought to recover the value of the property. 87 Cal. 15.

The assignee of a bailor's interest in wine converted by a factor may maintain an action for its value, though such wine was only a part on of that consigned. The rule against splitting up a cause of action does not apply. 87 Cal. 15.

BANKING GAME.

See CRIMINAL LAW.

BANKRUPTCY.

See INSOLVENCY; FRAUD.

BANKS.

A savings bank not authorized to pay dividends when. 74 Cal. 598.

Subscriptions to stock of banking corporation may be by note. 72 Cal. 55.

Certificate of deposit is payable, not to the agent who deposits, but to the owner. 78 Cal. 464.

National banks may be sued in any state where they exist, like natural persons. 83 Cal. 491.

All of the stock of a bank need not be subscribed before commencing business. 74 Cal. 598.

A banking corporation that has not complied with the law cannot maintain suit. 79 Cal. 463.

The officer of a bank who transacts its business have authority to do all acts incidental thereto. 79 Cal. 323.

A bank is not liable for money collected on a note left in the hands of its cashier for collection in its individual capacity. 87 Cal. 569.

The books of a bank showing original entries are admissible in evidence to show the transaction between itself and customer. 87 Cal. 569.

The testimony of a payee of what a deceased cashier has told him will not be sufficient to disturb the findings in favor of the bank when his testimony is self-contradictory and inherently improbable. 87 Cal. 569.

See BONDS.

BATTERY.

See CRIMINAL LAW.

BENEFCIAL ASSOCIATION.

By-laws of, construed. 68 Cal. 392.

Secession from, as a waiver of interest in property rights. 70 Cal. 163.

Members of, presumed to have notice of restrictions in the by-laws. 70 Cal. 129.

Mere copy of articles of association not admissible in evidence when. 71 Cal. 183.

The treasurer of a benevolent society may sue for himself and co-members, to compel its ex-treasurer to pay over the society's funds. 77 Cal. 247.

A benevolent association incorporated to promote the cause of temperance cannot divide the corporate property among its members. 84 Cal. 61.

Any member may maintain an action to prevent such a misappropriation. 84 Cal. 61.

Every stockholder has a right to sue in equity to prevent any departure from the chartered purposes of the corporation. 84 Cal. 61.

The word "temperance" is too vague to import or establish a public charity so as to be the basis of an information in *quo warranto*. 84 Cal. 114.

Courts will protect unincorporated associations in their property and rights, in like manner as if they were incorporated; and such association has authority to expel or suspend members, but the courts will decide whether the grounds for expulsion are well taken. 75 Cal. 308.

In mutual life insurance associations, suspension or expulsion is not necessary to forfeit policy. 76 Cal. 109.

Where the nominee for benefits is dead, there is no legal liability to pay the policy to any person. 76 Cal. 494.

Acceptance of payment waives all forfeiture for past delinquency. 81 Cal. 340.

By-laws may be amended so as to affect future benefits, but not vested claims. 82 Cal. 557; 82 Cal. 648.

A change of beneficiary in a mutual benefit association, made according to its by-laws and indorsed by the secretary, held valid substitution. 87 Cal. 308.

The insertion in a will of a direction to the beneficiary to apply the proceeds of mutual benefit policy is not an attempt to devise by will, the policy, or its proceeds. 87 Cal. 308.

See CERTIFICATES; CORPORATIONS; INSURANCE.

BILL OF EXCEPTIONS.

Application to supreme court to settle must be on notice to trial judge, and set forth exceptions and evidence. 68 Cal. 413; 75 Cal. 229.

Such settlement will not be refused unless the record shows the bill not presented in time; and such bill need not contain errors of law, and may be settled after appeal. 69 Cal. 572.

When bill of exceptions contains no evidence, the judgment will not be reversed for alleged error in refusing instructions. 77 Cal. 30.

Mandamus will lie to compel a superior judge to settle a bill of exceptions. 80 Cal. 483; 82 Cal. 480; 83 Cal. 83.

The fact that the proposed bill is untrue and defective is no excuse. *Id.*

Section 652 of the Code of Civil Procedure applies only when the judge refuses to allow an exception. 82 Cal. 490.

Questions as to costs can only be reviewed on bills of exceptions. 82 Cal. 19.

The recital in findings, "that a jury was waived," cannot prevail against a showing to the contrary in a bill of exceptions. 83 Cal. 471.

It is too late after the court has settled the bill of exceptions, and an appeal has been perfected, to petition, to prove an exception in the supreme court. 83 Cal. 44.

The remedy for a refusal of the trial court to settle a general bill of exceptions is not by petition, but by *mandamus*. 83 Cal. 83.

A petition for a writ of mandate to compel the settlement of a bill of exception held sufficient. 86 Cal. 154.

The supreme court has no jurisdiction to remodel a bill of exceptions. 86 Cal. 332.

A certain petition for a writ of mandate to compel the settlement of bill of exceptions held insufficient. 84 Cal. 547.

The statute providing for a petition to the supreme court to prove an exception has no application where the judge had no power to allow such exception, or where no exception has been in fact disallowed. 87 Cal. 390.

See APPEALS; CRIMINAL LAW; NEW TRIALS.

BILL OF PARTICULARS.

A bill of particulars may be explained so as to show erroneous blending of items. 84 Cal. 181.

The plaintiff is only required to furnish a correct copy of his books of accounts in a bill of particulars. The penalty only applies when the party refuses to furnish the same. 84 Cal. 181.

Objection to proof for want of, must show demand and refusal. 70 Cal. 500.

When the defendant is in possession of the original account, further account, under section 454 of the Code of Civil Procedure, is unnecessary. 74 Cal. 60.

Such section is not applicable to an account stated. 74 Cal. 60.

See ACCOUNTS; PRACTICE.

BILL OF SALE.

See SALE.

BLASTING.

See NEGLIGENCE.

BOARDS.

Members of board of health do not forfeit their office by failure to file oath with the county clerk. 79 Cal. 105.

The constitutional term of such office cannot exceed four years. 79 Cal. 105.

Mandamus will lie to compel the San Francisco board of education to pay for its school supplies. 81 Cal. 542.

The rules of the board of education cannot override the statute. 82 Cal. 433.

Boards of education cannot establish schools exclusively for colored children, or exclude them. 82 Cal. 588.

San Francisco boards of education cannot remove or demote the teachers without good cause. 82 Cal. 483.

Mandamus is a proper remedy to restore a teacher to his position. 82 Cal. 483.

See PUBLIC OFFICER; SURETY.

BONA FIDE PURCHASER.

The burden of proving that a grantee had notice of a third person's claim is on the plaintiff. 68 Cal. 8. A *bona fide* purchaser is not affected by a secret or resulting trust. 83 Cal. 39.

A *bona fide* assignee of a legacy is entitled to have it distributed to him. 71 Cal. 105.

Satisfaction of mortgage on margin of the record is notice that the same has been paid. 72 Cal. 451.

Certain bonds of San Luis Obispo County held void, even in the hands of a *bona fide* purchaser. 74 Cal. 332.

Bona fide purchase of stolen property, how proven. 74 Cal. 575.

A recorded sheriff's certificate of sale will prevail over an unrecorded deed of which no notice was had. 75 Cal. 552.

Means of knowledge held to be "constructive notice." 75 Cal. 128.

A *bona fide* pledgee of a promissory note executed without consideration is only entitled to the amount of his pledge. 75 Cal. 86.

A conveyance made to defraud is good in the hands of a purchaser from the grantee for value, without notice of the fraud. 77 Cal. 218.

A *bona fide* purchaser of a promissory note before maturity, for value, without notice of fraud, is not affected by the fact that the note was procured by fraud. 77 Cal. 572.

A school order signed by two trustees, one of whom is disqualified, is void, and the holder thereof is not a *bona fide* purchaser, nor is such order negotiable. 77 Cal. 638.

The assignee of the holder of a certificate of purchase to buy state lands is not protected by the rule as to *bona fide* purchasers. 77 Cal. 534.

A purchaser from an agent without consideration obtains no title. 79 Cal. 115.

A person who buys land in the open, notorious, and exclusive possession of another is charged with notice of such person's interest therein. 82 Cal. 621.

Knowledge of any fact sufficient to put a purchaser on inquiry is notice. 82 Cal. 114.

A deed procured by fraud conveys the legal title as in favor of a subsequent mortgagee who had no notice of the fraud. 85 Cal. 542.

Actual possession by a lessee is sufficient to put a purchaser on inquiry as to the extent of his claim, regardless of whether the purchaser knew of the possession or not. 85 Cal. 270.

A party who takes land with notice of an unrecorded mortgage, and transfers it to an innocent purchaser, who afterwards retransfers it to him, remains bound by the notice. 86 Cal. 423.

A note purchased from one of its makers presumptively puts the purchaser on inquiry as to its payment. 86 Cal. 184.

See DEED; FRAUDULENT CONVEYANCE; SALE; TRUST.

BOND.

The administrator of a co-obligor on a bond may be joined with an obligor as defendant. 68 Cal. 310.

A surety is discharged by altering, without his consent, the terms of the obligation of the contract for the performance of which he is surety. 70 Cal. 108.

One or more sureties on an official bond may be joined as defendants. 73 Cal. 265.

A bond of indemnity creates no cause of action till the sheriff has been compelled to pay damages. 74 Cal. 478.

The bond of a license collector appointed by the supervisors is an official bond. 74 Cal. 373.

Supervisors cannot issue bonds except as authorized by law. 74 Cal. 332.

Road bonds of Yuba County, time of payment construed. 75 Cal. 452.

County bonds held invalid for want of legality in election. 83 Cal. 149.

A debtor of an insolvent cannot raise the question as to the sufficiency of the bond of the assignee. 75 Cal. 496.

Application under section 709 of the Code of Civil Procedure must be upon notice. 75 Cal. 261.

Interest paid by the state to aid the construction of the Central Pacific railroad is not a loan. 76 Cal. 29.

A bond of indemnity executed to the sheriff by his deputy is the property of the sheriff. 76 Cal. 246.

An admission of the receipt of money by a principal is evidence against his sureties. 76 Cal. 1.

An official bond is invalid until delivered. 79 Cal. 84.

There can be no delivery until its approval. 79 Cal. 84.

Statutes of limitation for breach of an official bond begin to run at the expiration of the term. 79 Cal. 84.

The liability of the surety is fixed by the liability of the principal, as shown by the judgment against him. 80 Cal. 647.

An indemnity bond providing for counsel fees cannot be presumed to exclude them. 80 Cal. 647.

The by-laws of a bank form a part of the contract of the sureties of the bond of the secretary. 81 Cal. 528; but in such case it is only the funds of the bank that are protected by the bond. *Id.*

The treasurer of Sacramento city cannot be compelled by *mandamus* to pay interest on the bonds of that city issued under the act of 1856. 82 Cal. 550.

As to compound interest in such cases, see 82 Cal. 562.

See APPEALS; ATTACHMENTS; ELECTIONS; INJUNCTIONS; IRRIGATION DISTRICTS; SURETIES.

BOOKS OF ACCOUNT.

See ACCOUNTS.

BOUNDARY.

Courses and distances are controlled by natural objects and monuments. 68 Cal. 106; 79 Cal. 443; 79 Cal. 540.

Of Mexican grant, rules for determining. 69 Cal. 160; 85 Cal. 313.

"High-water mark" is presumed to be the sea-shore boundary. 70 Cal. 206.

Where a patent is to a section according to the official plat of the surveyor-general, parol evidence is not admissible to show that the patent line was erroneous; in such cases the government survey, whether correct or not, is the boundary line. 70 Cal. 495.

A deed in which land is described as being bounded by a public road carries the title to the center of the road, subject to public use. 71 Cal. 21.

A patent to land as bounded by a navigable river carries title only to the edge of the river. 71 Cal. 134.

The boundaries between two ranches held under patent must be according to official field-notes and surveys. 73 Cal. 166.

The boundaries of a Mexican grant are presumed to be established by the final survey of the United States surveyor-general. 74 Cal. 302.

A mistake in a boundary line by which a large tract of land was lost by erroneous conveyance may be corrected by decree, and the statute of limitation does not begin to run till the discovery of the mistake. 74 Cal. 303.

Where a division fence is fixed by mutual consent, and is acquiesced in for five years, neither party can dispute it. 75 Cal. 610; 76 Cal. 476; 77 Cal. 579.

It is essential, however, that such lines should be fixed and agreed to. *Id.*

In relocating the boundaries of an official United States survey, the calls of the field-notes as to the location of certain natural monuments must prevail over the specified courses of the boundary lines. 84 Cal. 159. See 84 Cal. 193.

Silent assent and consent in a division line for sixteen years operate as an estoppel against the coterminous owners. 76 Cal. 395; 76 Cal. 476.

Land formed by accretion on the bank of a stream belongs to the owner of the bank. 78 Cal. 634.

The declaration of an owner of land as to its ownership is admissible against his grantees. 79 Cal. 411.

Where a division fence is erected for temporary convenience by an owner without any intention of permanency, either may dispute it. 79 Cal. 411.

Proof of boundary by common reputation. 83 Cal. 240.

Boundaries of irrigation districts. 79 Cal. 351.

Monuments erected in making United States surveys control the field-notes, and are the best evidence. 80 Cal. 281.

In ascertaining the boundaries of a patent, the courses and distances must yield to the natural objects or monuments. 85 Cal. 313.

The boundaries of pueblo lands of San Francisco are governed by those described in the decree of confirmation. 85 Cal. 448.

The possession which the law requires to show a *possession pedis*, under Van Ness ordinance, defined and described. 85 Cal. 155.

A finding in relation to a certain boundary along the original bank of a river, which bank could not be found or traced, held not sustained by the evidence. 87 Cal. 97.

In a conflict between a natural boundary or shore line and the line as given by courses and distances, the former must control. 87 Cal. 23.

The admission of evidence tending to show the location of a certain house which was one of the calls of a United States patent held proper. 87 Cal. 23.

The official survey of the grants mentioned in the act fixing the boundary between San Bernardino and San Diego held proper evidence of the location of the boundary. 87 Cal. 287.

See HIGHWAYS; MINING CLAIMS.

BREACH OF CONTRACT.

See CONTRACT; DAMAGES.

BRIBERY.

See CRIMINAL LAW.

BRIDGE.

See COUNTY.

BRIEF.

See APPEAL.

BROKER.

A broker's authority to sell land must be in writing, before he can recover his commission. 75 Cal. 509.

Brokerage partnership construed. 84 Cal. 256.

A broker employed to sell land has not thereby authority to convey. 76 Cal. 616.

A broker having the right to sell a tract of land for a period cannot recover commissions if the owner sells within such period, unless he has produced a purchaser. 82 Cal. 669.

See AGENCY; EVIDENCE; STATUTE OF FRAUDS.

BURDEN OF PROOF.

See EVIDENCE; CRIMINAL LAW.

BY-LAWS.

See BENEFICIAL ASSOCIATIONS; CORPORATIONS.

CALAMITY.

See NEGLIGENCE.

CATTLE.

An agreement to pasture cattle on land for one year is not a lease. 68 Cal. 290.

CENTRAL PACIFIC RAILROAD.

Interest paid by the state on bonds, under act of April, 1864, is not a loan. 76 Cal. 29.

In an action for breach in condition under act of April, 1864, the complaint must state the breach and the amount of damages. 76 Cal. 29.

See CONSTITUTIONAL LAW; CORPORATIONS; TAXATION.

CERTIFICATES.

Of marriage, as evidence in adultery. 71 Cal. 263.

In such case change in the name may be shown. 71 Cal. 263.

Certificate of purchase for school-land is presumptive evidence of title, and is assignable. 71 Cal. 21.

A certificate of discharge from the army is not evidence as to character. 72 Cal. 582.

A certificate of deposit belongs, not to the depositor, but to the person in whose name it is deposited. 73 Cal. 464.

If the title acquired by certificate of purchase of school-land is sold under execution, the purchaser is entitled to the patent without producing certificate. 73 Cal. 360.

The certificate of the United States Register that certain land had been listed to the state is not evidence. 74 Cal. 316.

The objection that plaintiffs have not filed certificate of copartnership is matter of defense. 74 Cal. 151. An attorney in fact may make such certificate. 74 Cal. 586.

A certificate of sale under execution, to one who had no notice of an unrecorded deed, is not affected by such deed if first recorded. 75 Cal. 552.

Certificate of sale under execution cannot

be amended so as to prejudice the rights of third parties. 81 Cal. 362.

See EVIDENCE; PUBLIC LAND.

CERTIFICATES OF SALE.

See EXECUTION.

CERTIORARI.

An appeal from a justice's court, illegally dismissed, will be reinstated on *certiorari*. 70 Cal. 628; 71 Cal. 550.

An appealable order or judgment is not reviewable on *certiorari*, even when the time for appeal has expired. 71 Cal. 545; 71 Cal. 322; 74 Cal. 217.

Service of alternative writ must be made on the court and on the opposite attorney. 71 Cal. 583.

A petition for *certiorari* made on information and belief held insufficient. 84 Cal. 642.

A person who applies for a writ of *certiorari* must show some particular beneficial interest in the matter. 71 Cal. 236.

An order of the superior court extending time to plead for more than thirty days will be annulled on *certiorari*. 71 Cal. 583; 83 Cal. 643.

Certiorari is not the proper remedy to open a default, so as to permit a non-resident to prove heirship. 73 Cal. 295.

Certiorari cannot be used to prevent a threatened excess of jurisdiction. Its function is to review. 84 Cal. 642.

A justice of the peace cannot vacate a judgment except one by default; an attempt to do so will be reviewed on *certiorari*. 74 Cal. 341.

A judgment by default in a justice's court will not be reviewed on *certiorari*, when the court had jurisdiction. 75 Cal. 253.

A search-warrant cannot be reviewed on *certiorari*. 75 Cal. 371.

An order appointing attorney to represent absent creditors in electing assignee is not reviewable on *certiorari*. 75 Cal. 596.

When all the points on the writ of review are passed on by demurrer, as appears from the answer, judgment may be had on the pleadings. 77 Cal. 291.

An order extending time to answer over thirty days is in excess of jurisdiction, and reviewable on *certiorari*. 83 Cal. 643.

On *certiorari*, the record is conclusively presumed to be correct; if not correct, the court below should amend it. 79 Cal. 475; 80 Cal. 144.

An appeal from an order of the superior court dismissing a writ of *certiorari* against a justice's court will not lie where less than three hundred dollars is involved. 82 Cal. 425.

An order granting an execution on a judgment after five years will be annulled on *certiorari*. 86 Cal. 275.

The action of the superior court in enforcing its rules as to appeals from a justice's court will be sustained upon *certiorari*. 86 Cal. 431.

A superior court order vacating an order after the expiration of six months is void, and will be annulled on *certiorari*. 86 Cal. 495.

Void orders extending the time to answer cannot be set aside in a proceeding to review an order refusing to vacate an order setting aside a default. The only remedy is by appeal. 85 Cal. 216.

An order directing a creditor of an estate to commence an action in the name of the administratrix will be annulled on *certiorari*. 85 Cal. 545.

A mere error in the appointment of a receiver cannot be reviewed by *certiorari*. 85 Cal. 11.

CHALLENGE.

See CRIMINAL LAW; JURORS; TRIAL.

CHANGE OF VENUE.

A motion for change of venue, for conveniences of witnesses, and because a fair trial cannot be had, is addressed to the discretion of the court. 68 Cal. 478; 76 Cal. 328; 78 Cal. 268; 80 Cal. 295. In civil cases a defendant is not entitled to the change, until he has filed an answer. 69 Cal. 606.

If the evidence as to defendant's residence is conflicting, an order refusing a change of venue to the county where he claims to reside will not be reversed. 69 Cal. 606.

When a change of venue is ordered, conditioned on payment of costs, and the costs are not paid for fourteen days, the order may be set aside. 69 Cal. 536.

It seems that when defendant files affidavits showing residence in another county, counter-affidavits may be also filed. 69 Cal. 607.

An appeal from an order refusing a change of venue does not stay proceedings in the trial court; if such order is reversed, an intermediate judgment on the merits will be reversed, on an appeal therefrom, as of course. 70 Cal. 635.

A change of venue may be had where the trial judge, while an attorney, had received a general retainer from one of the parties. 70 Cal. 646.

An appeal from the justice to the superior court cannot be transferred to another county, even if the defendant resides in such other county. 71 Cal. 382; 71 Cal. 555; 80 Cal. 559. Waiver of. 71 Cal. 555.

Cases in which a corporation is entitled to a change of venue. 71 Cal. 488.

An order changing a place of trial may be set aside, if inadvertently made. 73 Cal. 182.

An action to reform a contract of sale of land must be tried where the land is situated; so also any interest in or right to land. 79 Cal. 606; 80 Cal. 308; 87 Cal. 38.

In an action for false imprisonment, the defendant has the right of transfer to the county of his residence. 79 Cal. 30.

An order changing a place of trial will be presumed to be properly made, when the records fail to contain the papers used on hearing. 79 Cal. 50.

Where a case is transferred because of disqualification of the judge, the most accessible county may be selected. 79 Cal. 140.

After an order changing the venue to another court, a motion may be noticed for such other court, regardless of the fact that the papers have not been transferred. 80 Cal. 875.

The act creating the county of Orange did not deprive the Los Angeles courts of jurisdiction over cases previously commenced. Such cases could only be removed to the county of Orange on motion properly made. 85 Cal. 280.

The right of the defendant to a change of venue to the county where he resides is not affected by the joinder of another defendant, against whom no cause of action is stated. 82 Cal. 623.

The venue for the trials of actions against corporations is fixed by the constitution. 71 Cal. 488.

An action to set aside a fraudulent sale of land by administrator must be tried where the property is situated. 77 Cal. 129.

Venue in suits against a corporation. 83 Cal. 468; 83 Cal. 491; 71 Cal. 488.

Where any of the defendants reside in a county, the action may be tried there. 77 Cal. 448.

If a complaint states two causes of action, as to one of which defendant has a right to a change of venue, but not as to the other, the cause will be transferred. 79 Cal. 30.

An action for dissolution of copartnership and accounting relating to a mining claim is not required to be in the county where the claim is situated. 83 Cal. 181.

Prohibition will not lie to prevent a suit against a corporation from being tried in a particular county. The superior court of every county has general jurisdiction, with power to send its process into all parts of the state. 83 Cal. 491.

Bias on behalf of a judge, against a defendant corporation, will not entitle it to a change of venue. 83 Cal. 613.

On appeal from an order changing place of trial, the papers used on the motion must be duly authenticated. 83 Cal. 490.

See JURISDICTION.

CHARTER.

See CORPORATIONS.

CHASTITY.

See SLANDER; CRIMINAL LAW.

CHATTEL MORTGAGE.

The lien of a duly recorded mortgage on a growing crop is not lost by the illegal removal of the crop by a third person. Conversion lies against such persons in favor of mortgagee. 70 Cal. 196.

Mortgaged chattels can only be attached by paying off the lien. 71 Cal. 70.

Mortgage of personal property is valid as between the parties without delivery; but not as to creditors or subsequent purchasers. 76 Cal. 537.

A sale of pledged property must be made at public auction, on due notice. 82 Cal. 199.

One who converts mortgaged personal property is liable to the mortgagee for the amount of the mortgage, including interest and attorney's fees if provided. 80 Cal. 507.

A crop hauled to a warehouse at the request of the mortgagee remains subject to his lien, and a subsequent transfer by bill of sale to the mortgagee, by the mortgagor, is valid, without further actual delivery or notice to the warehouseman. 77 Cal. 244.

See PLEDGE; STATUTE OF FRAUDS.

CHECK.

See NEGOTIABLE INSTRUMENT.

CHILD.

See PARENT AND CHILD.

CHURCH.

In an action by a religious corporation against seceders, — complaint held sufficient; one suing for all; by-laws as evidence; power of majority. 79 Cal. 365.

See BENEFICIAL ASSOCIATIONS; PARTIES.

CITIES.

See MUNICIPAL CORPORATIONS.

CITY OF LOS ANGELES.

See MUNICIPAL CORPORATIONS.

CITIZENSHIP.

In an action by protestants against the issuance of a mineral patent, plaintiffs must each allege and prove citizenship. 68 Cal. 43; 83 Cal. 296.

Native-born minors are citizens, and may locate claims. 72 Cal. 528.

The right to purchase state land depends on citizenship; naturalization can only be proven by record evidence. 82 Cal. 513; 82 Cal. 647; 82 Cal. 570; 82 Cal. 104.

A certificate showing the naturalization of a person of Mongolian nativity is void, and cannot entitle him to be admitted as an attorney at law in this state. 84 Cal. 163.

See **MINING CLAIMS.**

CLAIM AND DELIVERY.

A judgment in replevin must be in the alternative, and the verdict must find the value of the property. 68 Cal. 5; 78 Cal. 573. But a verdict or judgment is not void for non-compliance with this. 73 Cal. 54.

A judgment may be joint, though the answers may be separate. 71 Cal. 498.

Under the plea of justification by attachment, the judgment roll in the attachment case is admissible. 71 Cal. 30.

Where the goods have been replevined and the suit dismissed, the judgment should be for the return of the property, and not in the alternative. 83 Cal. 645.

A judgment in the alternative form is required only when the judgment is rendered after trial. So held where the property was delivered to plaintiff, and judgment was rendered against him for the property and costs for failure to prosecute his suit. 83 Cal. 645.

Action of replevin for growing crops will not lie, where the defendant planted and harvested the same on land held and claimed adversely by him as his. 83 Cal. 147.

Where property is attached and the attachment dissolved by insolvency proceedings, the assignee may recover the property by replevin. 84 Cal. 554.

A complaint that a lot of hogs was worth a gross sum held supported by evidence that they were worth four or five dollars per head. 74 Cal. 520.

In such case an execution for the value of so many hogs as could not be found is proper. 74 Cal. 520.

Proof that property taken under attachment was exempt. 72 Cal. 243.

When a portion of the property cannot be found, judgment should be for the value of all, and not in the alternative. 75 Cal. 359.

An answer which denies plaintiff's ownership is not subject to general demurrer. 76 Cal. 267.

An action of replevin will not lie for

wheat grown by the defendant on land claimed by him and in his exclusive possession. 83 Cal. 147.

Ownership in third persons cannot be set up as a defense. 76 Cal. 287.

An officer is not justified in taking property without the affidavit, order, and undertaking required by law. 76 Cal. 287.

The court must find that plaintiff is entitled to the recovery of the property. A finding that he is entitled to judgment for a particular sum is insufficient. 78 Cal. 573.

The verdict in an action for replevin need not provide for the delivery of the property. The judgment, however, must be in the usual alternative form. 87 Cal. 345.

Damages may be claimed and recovered for both the taking and the detention. 87 Cal. 345.

Where the plaintiff obtains a verdict and judgment for only part of the property sued for, it must be presumed that his suit for the balance has been denied. In such case the defendant is entitled to receive such balance. 87 Cal. 345.

See **DAMAGES; DEMAND; INTEREST; JUDGMENT.**

CLAIM OF TITLE.

See **ADVERSE POSSESSION; STATUTE OF LIMITATIONS.**

CLERK OF COURT.

See **PRACTICE; NEGLIGENCE.**

CLOUD ON TITLE.

Action will lie to enjoin an execution sale as a cloud on plaintiff's title. 82 Cal. 279.

CODES.

Statutes passed prior to the codes are to be strictly construed. 81 Cal. 419.

When two sections are in conflict, that last passed must prevail. 73 Cal. 257.

"Liberal constructions" defined. 81 Cal. 419.

The subject-matter should be ascertained from the contents more than from the headlines. 76 Cal. 633.

COODICIL.

See **WILLS.**

COLOR OF TITLE.

See ADVERSE POSSESSION; EJECTMENT; INJUNCTION; QUIETING TITLE; STATUTE OF LIMITATION.

COMMITMENT.

See CRIMINAL LAW.

COMMON CARRIER.

A judgment against a common carrier for damages caused by negligence will not be reversed because the evidence shows that the liability was as a warehouseman. 68 Cal. 644.

"Luggage," in the code, means baggage. Money intended for investment is not luggage. 70 Cal. 169.

A county treasurer has no right to carry with him, as passenger, a large sum of public money; nor need a railroad company perform the work of an express company. 70 Cal. 169.

The breaking of a wheel of a stage-coach is *prima facie* evidence of negligence. In such case the burden of proof is on the company to show no negligence. 70 Cal. 417.

The fact that the passenger contributed to the injury by his own rashness is no defense, if he did only what a person of ordinary prudence would do. 70 Cal. 417.

A person engaged in transporting passengers for hire on a railroad is a common carrier. 78 Cal. 247.

Unless a passenger is ejected from a train, he has no cause of action for the ejection. 78 Cal. 360. In such case a nonsuit was properly granted. 78 Cal. 360.

Injury caused by excessive resistance to a proper removal is not ground for damages. 78 Cal. 360.

Goods are in law delivered to the buyer, when delivered to the designated carrier. 78 Cal. 439.

Damages, the necessary result of the injury, need not be specially pleaded in a suit against a common carrier. 80 Cal. 574.

Persons operating an elevator are regarded as common carriers of persons, and are bound to the utmost care of very cautious persons, and the vigilant use of the most improved machinery, and all known tests to insure its safety. 80 Cal. 574. In such case the breaking of machinery is *prima facie* evidence of negligence, and throws the burden of proof on defendant. 80 Cal. 574.

A passenger on a street-railroad is not bound to tender the exact fare, but must tender a reasonable sum. A five-dollar piece held not to be unreasonable. 81 Cal. 296.

A common carrier is not liable for any greater value of an article than that named on the receipt, or bill of lading. 84 Cal. 311.

A carrier has the right to assume that the consignee is the owner of the goods, and to settle for the loss with him. 84 Cal. 311.

The owner of lost goods may either demand their value or wait until they are recovered. 84 Cal. 311.

A contract to carry luggage only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their own personal use, convenience, or equipment. 85 Cal. 329.

COMMON COUNTS.

When admissible in pleading. 82 Cal. 258.

COMMON LAW.

The common law, adopted as the rule of decision of this state, does not mean the "civil law," nor the "ancient common law" of the civilians, nor the "Mexican law." 69 Cal. 255.

To ascertain the common law, the courts may examine the decisions of the English and American courts, down to the present time. 69 Cal. 255.

See WATER RIGHTS.

COMMUNITY PROPERTY.

See DIVORCE; HUSBAND AND WIFE; MARRIAGE; PROBATE LAW.

COMPLAINT.

See PLEADING.

COMPROMISE.

An attempt to compromise cannot affect the rights of the parties to the action. 70 Cal. 163.

Mere failure to accept an offer of compromise does not affect a plaintiff's rights to costs. 72 Cal. 392.

CONCEALMENT.

See CRIMINAL LAW.

CONCLUSIONS OF LAW.

See PLEADING.

CONDEMNATION OF LAND.

In suit against several defendants for condemnation of land, where one of them appeals, his co-defendant is an "adverse party" under section 940 of the Code of Civil Procedure. 68 Cal. 189.

The property of a riparian proprietor in water may be condemned. 69 Cal. 255.

In estimating the value of lands taken for public use, no regard must be had to the benefit it will confer on the remainder of the land. 74 Cal. 261.

Where a railroad company erects improvements before suit, such improvements are not to be considered in estimating the value of the land. 84 Cal. 435.

A *bona fide* offer is admissible as tending to prove the value of land. 83 Cal. 240.

Measure of damages for taking a street for railroad purposes. 83 Cal. 240.

The basis for estimating damages is the value of the land at the date when the summons issued. 83 Cal. 566.

Benefit from the proposed improvements cannot be considered as an offset. 83 Cal. 566.

The signing of an assessment list with a valuation attached is not a declaration by the tax-payer of the value of the land. 83 Cal. 566.

The "private roads" spoken of in section 2692 of the Political Code are really public roads, for which land may be condemned. 83 Cal. 507.

The burden of proving the value of land sought to be condemned is on the defendant. 83 Cal. 507.

The report of the viewers may be in lump; the answer need not be verified. 83 Cal. 507.

The law of notice by *lis pendens* is applicable to proceedings for condemnation of land. 74 Cal. 263.

The value of land taken is its market value for any purpose, even if taken in connection with plaintiff's property. 78 Cal. 63. But value as increased by reason of the proposed improvements cannot be considered. *Id.*

In proceedings to condemn a right of way, the cost of maintaining a fence on each side of the proposed roadway is a proper item of damages. 85 Cal. 633.

In assessing damages for property taken, in a suit to condemn a right of way, the value of a private road to be used as part of the highway is a proper subject for consideration. 85 Cal. 633.

In an application for an injunction to restrain a municipal corporation from erecting a bridge, the fact that the work is of a public nature, and that there is no doubt of the ability of the defendant to respond in damages, are important matters to be considered. 85 Cal. 614.

In a suit to condemn a right of way for a railroad, the improvements made by the railroad company before commencement of

the proceedings cannot be considered. 85 Cal. 246.

The action to condemn land for a "private" roadway may be brought in the name of the county. 83 Cal. 507.

A writ of prohibition will not lie against the city to prevent it from prosecuting an action to condemn a right of way for a sewer, on the ground that there is no averment that the city could not agree with the defendant, or that the municipal corporation had directed the institution of the suit. 87 Cal. 226.

The superior court derives its jurisdiction to entertain a proceeding by a city to condemn property for a right of way from the constitution. 87 Cal. 226.

Under section 1246 of the Code of Civil Procedure, the lessee of land about to be condemned may appear and defend his interest, and where he fails to do so after notice, he is estopped by the judgment, if his lease was subsequent to the filing of the *lis pendens*. 87 Cal. 253.

CONFESSION.

See CRIMINAL LAW.

CONFESSION OF JUDGMENT.

See JUDGMENT.

CONSENT.

See ATTORNEYS; ACQUIESCENCE.

CONSIDERATION.

See CONTRACTS; DEEDS; MORTGAGES.

CONSPIRACY.

See CRIMINAL LAW; FRAUD.

CONSTABLE.

See PUBLIC OFFICER.

CONSTITUTIONAL LAW.

General rule.—Every presumption is in favor of the constitutionality of legislative enactments. One who assails the constitutionality of a statute must not only overcome the strong presumption in favor of its validity, but must show that by the natural and necessary import of the language it is clearly in conflict with supreme law. Doubt as to the construction of a statute must be

resolved, if possible, in harmony with the constitution. 83 Cal. 111.

Act of March 21, 1885, amending section 274 of the Code of Civil Procedure, as to salaries of shorthand reporters, declared unconstitutional, because imposing legislative functions upon the judiciary. 68 Cal. 194.

Section 4, county government bill of March, 1885, declared unconstitutional, because involving local and special legislation affecting the fees or salaries of the officers. 68 Cal. 142.

The general rule is, that an act is not void because some of its provisions are unconstitutional. 79 Cal. 105.

A law authorizing a jury to view the place of crime, in the absence of the defendant, is unconstitutional. 68 Cal. 625.

State lands fit for cultivation can only be granted to actual settlers, under the constitution. 68 Cal. 267; 71 Cal. 318; 72 Cal. 236.

Search-warrants are not forbidden by the constitution. 68 Cal. 284.

The act for the payment of the "drainage claims" held constitutional. 72 Cal. 462.

Act of March 19, 1878, relating to street assessment, declared unconstitutional. 68 Cal. 423.

The governor has nothing to do with proposed amendments to the constitution; nor does the legislature therein exercise legislative power. 69 Cal. 514.

The amendment to the constitution of November, 1884, relating to street assessments, held invalid, because not entered on the journals of the legislature. 69 Cal. 512. *Per contra*, 72 Cal. 9.

The act of March 15, 1883, providing for the imprisonment of minors in private reformatories, held not unconstitutional. 71 Cal. 627.

An ordinance requiring peddlers of goods produced outside the state to obtain a license held unconstitutional. 71 Cal. 204.

A cause on appeal from a justice's court to the superior court of a county cannot be transferred to another county. 71 Cal. 382. Section 980 of the Code of Civil Procedure, purporting to authorize it, is unconstitutional. 71 Cal. 555.

Section 16, article 12, of the constitution governs the venue in actions against corporations. 71 Cal. 483.

Act of May 5, 1872, relating to the funded debt of Sacramento, was not abrogated by the constitution. 71 Cal. 310.

Sheep-tax ordinance declared unconstitutional. 72 Cal. 387.

The San Francisco cow ordinance declared constitutional. 72 Cal. 114.

The San Francisco fire-limit ordinance declared constitutional. 72 Cal. 125.

The act providing for widening Dupont Street declared constitutional. 72 Cal. 404.

The provision of "once in jeopardy" is not contravened by a retrial after a reversal

obtained, because the verdict failed to find the degree of the crime. 73 Cal. 580.

Provisions relating to the "title of an act" held satisfied. 73 Cal. 257.

Provisions relating to newspaper libels construed. 73 Cal. 120.

High-license ordinance declared constitutional. 73 Cal. 632.

The Mono grazing-license ordinance declared constitutional. 73 Cal. 365.

Act of March 2, 1883, classifying municipal corporations, held constitutional. 73 Cal. 310.

Ordinances punishing precisely the same acts as are forbidden by the Penal Code held unconstitutional. 73 Cal. 142; 84 Cal. 304.

One holding a federal office cannot be elected to a state office under the constitution. 73 Cal. 235.

The constitution held not retroactive as to the charters of cities or their ordinances. 73 Cal. 622.

A tax imposed by the legislature on foreign corporations for municipal purposes is unconstitutional. 74 Cal. 113.

A corporation may be organized to supply water only to its stockholders and such corporation is not governed by the water rates fixed by the boards of supervisors. 74 Cal. 571.

An attempt to pay the debts of a county out of the revenue of a future year is unconstitutional. 75 Cal. 502.

An act permitting guardians to convey a right of way for railroads is constitutional. 75 Cal. 642.

The act of March 30, 1874, for the punishment of malfeasance in office, ceased to exist for want of conformity to the constitution. 75 Cal. 147.

The act of March 7, 1887, providing for irrigation districts, etc., is constitutional. 76 Cal. 360.

A mortgage requiring the payment of taxes on the mortgage is void as to such taxes, but is not otherwise invalid. 76 Cal. 291.

In matters where a writ of error lies to the supreme court of the United States, the decision of that court is supreme. 77 Cal. 518.

The act of April, 1876, regulating the practice of physicians and surgeons, is not unconstitutional as a whole. 77 Cal. 164.

The legislature cannot delegate to a board of medical examiners its power of declaring what shall constitute a misdemeanor. 77 Cal. 164.

The superior court has no jurisdiction over cases of misdemeanor "otherwise provided for." 78 Cal. 556.

The act of March 5, 1889, creating the police court of the city and county of San Francisco, is constitutional. 78 Cal. 421.

The act of April 5, 1880, to provide for the protection of land from overflow, other than swamp-lands, is unconstitutional, because it

deprives the owner of his property without due process of law. 79 Cal. 90.

The statute fixing the term of the board of health of San Francisco at five years is unconstitutional. 79 Cal. 105.

Sections 1020 and 1165 of the Penal Code are not in conflict with the constitutional provision as to "once in jeopardy." 79 Cal. 178.

The constitutional provision providing for a railroad commission extends to all corporations, companies, partnerships, and individuals engaged in transportation. 79 Cal. 159.

Individuals may sue to condemn land for railroad purposes, as well as corporations. 79 Cal. 159; 79 Cal. 549.

Insolvent act of 1880, discharging the debtor from debts previously contracted, is constitutional. 79 Cal. 183.

A city charter may be approved by the legislature without the consent of the governor or a formal bill. 79 Cal. 173.

Contracts for street improvement made before the constitution are not affected by it. 79 Cal. 45.

Where there is no legal machinery to carry the constitution into effect, the courts of chancery will enforce the will of the people. 80 Cal. 359.

The act of March 4, 1889, creating a police-relief, insurance, and pension fund, is constitutional. 80 Cal. 265.

The power of appointment to office, when not regulated by the constitution, may be regulated by statute. 80 Cal. 235.

A law will be presumed to have been made in accordance with the constitution. 80 Cal. 211.

Counties are not municipal corporations within the meaning of section 6, article 11, of the constitution. 81 Cal. 489.

The harbor commissioners have power to create the office of wharfinger, and consequently to abolish it, and so discharge the incumbent; the act authorizing this is constitutional. 81 Cal. 20.

The legislature cannot compel the owner to pay twice for a building, by a mechanic's lien law, but may provide for a record of the contract, etc., as necessary to its validity. 81 Cal. 170.

The provision excepting the present incumbents from a decrease of salary does not favor persons appointed to fill vacancies. 81 Cal. 588.

The supreme court may grant a rehearing after a hearing in bank, by an order entered on its minutes, without the written signature of five justices, as required by section 45 of the Code of Civil Procedure. 81 Cal. 408.

Police courts can only be established by virtue of section 6, article 11, of the constitution, and the general laws thereunder. 82 Cal. 339.

Under the constitution a petition for re-

hearing must reach the hands of the court within thirty days after the judgment of the department. 82 Cal. 595.

The constitution confers on the superior court jurisdiction in the nature of *quo warranto* to test the right of any person to public office. 82 Cal. 238.

Under article 14 of the constitution, the board of supervisors can only fix the price of water for public sale in accordance with reason and justice. 82 Cal. 286.

The following have also been declared constitutional: Laundry ordinance of San Francisco. 68 Cal. 294. Laundry-license ordinances of Oakland. 68 Cal. 635. Los Angeles high-license ordinance. 69 Cal. 88. Modesto laundry ordinance. 69 Cal. 149. Stockton license ordinance. 70 Cal. 35. The act creating Orange County. 81 Cal. 489. Act providing for classification of municipal corporations. 73 Cal. 310. Stockton ordinance against visiting houses of prostitution. 73 Cal. 228. Eureka liquor ordinance. 73 Cal. 632. San Francisco cow ordinance. 72 Cal. 114. San Francisco fire-limit ordinance. 72 Cal. 125. Pasadena prohibition ordinance. 74 Cal. 20. San Francisco fire ordinance. 76 Cal. 511. The vaccination act of 1839. 84 Cal. 226. The statutes relating to adoption. 83 Cal. 322.

Provisions of the constitution relative to place of trial against corporations construed. 83 Cal. 491; 83 Cal. 468.

The act providing for the appointment of supreme court commissioners held to be constitutional. 83 Cal. 111.

Berkeley special charter construed. 84 Cal. 655.

Sections 3665 to 3679 of the Political Code, relative to the taxation of railroads, held unconstitutional. 83 Cal. 393.

A county ordinance in conflict with a general law is void unless such law is unconstitutional. 84 Cal. 71.

Subdivision 15 of the county government act as amended in 1889 is unconstitutional. 84 Cal. 71.

The ordinance of the city and county of San Francisco relative to death certificates and permits for interment held unconstitutional. 84 Cal. 304.

It is not necessary that the title of an act should embrace an abstract or catalogue of its contents. 84 Cal. 226.

Police power of the state defined. 84 Cal. 226.

The Los Angeles ordinance against the employment of Chinese labor, or of any person to work more than eight hours a day, held unconstitutional. 85 Cal. 274.

The fact that a subdivision of an ordinance is invalid does not necessarily invalidate the remaining portions. 85 Cal. 208.

An ordinance making the issuance of a liquor license to depend upon the permission of the police commissioners, or the approval

of twelve property owners, held not unconstitutional. 85 Cal. 208.

Whenever a proceeding is such as must test the validity of a municipal charter, the municipality must be made a party. 85 Cal. 238.

The provisions of the constitution relating to the organization of municipal corporations are mandatory and prohibitory. 85 Cal. 238.

Statutes under the constitution are subject to and must be controlled by it, and can neither enlarge nor diminish its scope. 85 Cal. 343.

The jurisdiction, powers, and duties of the inferior courts established by the legislature must be provided for by a formal bill passed for that purpose by the legislature, under sections 15 and 16, article 4, of the constitution. 85 Cal. 333.

There can be no *de facto* judge of a court that has no legal existence. 85 Cal. 333.

The provisions of the Los Angeles charter creating a police court are unconstitutional. 85 Cal. 632.

The act of March 16, 1889, amending an act to reincorporate the city of San Diego, held unconstitutional, because special and local. 85 Cal. 369.

The compensation of the Stockton justices of the peace cannot be changed by charter provisions, and can neither be so increased nor diminished during the term of the incumbents. 85 Cal. 593.

The act of March, 1889, relating to the increase of the police force of Sacramento, held unconstitutional. 85 Cal. 408.

Under the constitution, all charters adopted under it are subject to general laws. A special charter adopted by a city under section 8, article 11, is no exception to this rule. 86 Cal. 37.

The act of March 16, 1889, relating to the municipal jurisdiction of the city of San Diego, held unconstitutional. 86 Cal. 158.

The act providing that certain prisoners in the city and county of San Francisco may be sentenced to the house of correction is not special or local within the meaning of section 25, article 5, of the constitution. 87 Cal. 78.

Subdivision 2, section 1033, of the Penal Code, regarding a change of venue to another county upon motion of the district attorney, is unconstitutional. The right of trial by jury, as mentioned in the constitution, is declaratory of the common law, which required that the jury be selected from the vicinage or county where the crime was committed. 87 Cal. 348.

The Wright irrigation act is constitutional, and the districts under its provisions are public corporations. 87 Cal. 140.

The county government act prohibiting the increase of the salary of a county officer during his term does not apply to incidental expenses or prevent an increase of allowance

to county superintendents for their traveling expenses. 87 Cal. 394.

The San José ordinance against the obstruction of sidewalks and prescribing a penalty is constitutional and valid. 87 Cal. 91.

Section 3649 of the Political Code, providing for the assessment of property which escaped assessment in the preceding year, is not unconstitutional. 87 Cal. 499.

The provisions of section 44 of the charter of Los Angeles, directing the city counsel to appoint a depository of the public moneys, is unconstitutional. 87 Cal. 603.

See STATUTES.

CONTEMPT.

A party who agrees for a consideration to influence the decision of the supreme court is guilty of contempt. 69 Cal. 1.

A contempt out of court is criminal in its nature, and guilt must be proven beyond all reasonable doubt. 69 Cal. 13.

A party served with a subpoena *duces tecum* is not guilty of contempt for a failure to search for and produce a large class of documents. 70 Cal. 638.

A witness who refuses to be sworn in court is guilty of contempt. 70 Cal. 51.

In such cases, each refusal on subsequent days is a separate contempt. 70 Cal. 53.

When, on a motion to set aside an indictment, a grand juror refuses to testify, he is guilty of contempt. 71 Cal. 212.

Re-entry by defendant after the execution of a writ of restitution is contempt, regardless of time. 70 Cal. 211.

Mandamus lies against the superior court to compel it to hear a proceeding of contempt. 70 Cal. 211.

No appeal lies from an order dismissing a proceeding for contempt. 70 Cal. 210; 72 Cal. 96.

The refusal of a witness to answer an impertinent question is not contempt, and an order adjudging him guilty is invalid. 71 Cal. 238.

A refusal in open court to pay alimony is contempt. 71 Cal. 608.

A superior judge who willfully refuses to enter a judgment in accordance with the supreme court decision is guilty of contempt. 71 Cal. 586.

The sufficiency of the evidence for a judgment of contempt cannot be reviewed on *habeas corpus*. 84 Cal. 50.

A person who refuses to deliver property claimed by an administrator, but also claimed by himself, is not guilty of contempt. 71 Cal. 2-9.

The superior court cannot punish the refusal to obey the mere subpoena of a notary as contempt. 72 Cal. 510.

One who insists in holding a public office

after being adjudged a usurper is guilty of contempt. 73 Cal. 486.

A judgment for contempt that conforms to section 1205 of the Penal Code is valid. 73 Cal. 486.

An adjudication of insolvency does not relieve from liability to pay alimony, nor from contempt of court for failure to so pay. 73 Cal. 97.

One who by legal process willfully obstructs a search-warrant issued by a superior court in a criminal proceeding is guilty of contempt. 74 Cal. 109.

A person confined in jail for contempt for refusing to pay alimony is entitled to be discharged under section 1143 of the Code of Civil Procedure, on proof of inability to pay. 75 Cal. 580. See 79 Cal. 215.

When a writ of prohibition is issued against a superior judge, and a receiver appointed by him, it is the duty of such judge to see that the receiver obeys the writ. Each is guilty of contempt in disobeying it. 87 Cal. 267.

If the acts of officers are done in good faith, and under legal advice, without any intention of disrespect to the court, though it cannot wholly relieve them of contempt, it will preclude their being punished by more than a nominal fine. 87 Cal. 267.

Disrespect to the trial court, shown by the brief filed in the appellate court, is contempt of the latter. 75 Cal. 91.

Jurisdiction to punish for contempt committed in open court is lost by a delay of fifty days to proceed. 76 Cal. 543.

On the test by *habeas corpus* of a judgment for contempt, the only question to be considered is the jurisdiction of the court over the person and subject-matter. Mere irregularities will not be considered. 77 Cal. 198. In such cases, the record of the superior court as to the fact showing jurisdiction is conclusive, and jurisdiction will be presumed where such record is silent. 77 Cal. 198.

The failure of an officer to produce the body of a prisoner on *habeas corpus*, when he has power to do so, is contempt. 77 Cal. 156.

In such case, no affidavit or order to show cause is necessary, and the finding of the court as to the facts of the case is conclusive. 77 Cal. 163.

No mere irregularity or misnomer, not going to the jurisdiction of a judgment for contempt, can be inquired into on *habeas corpus*. 79 Cal. 584.

A judgment of imprisonment for contempt cannot authorize imprisonment at hard labor, nor can the fine inflicted be enforced by compulsory labor. 80 Cal. 201.

A contempt is, at the most, only *quasi* criminal. 80 Cal. 201.

A judgment for contempt, within the jurisdiction of the court, is final and conclusive. 81 Cal. 64.

The fact that some of the averments of the affidavit charging contempt are made on information will not warrant a discharge on *habeas corpus*. 84 Cal. 50.

An order imprisoning defendant until he does something not required by the original injunction is invalid. 81 Cal. 64.

When an order committing for contempt is void on its face, it can be tested on *habeas corpus*. 82 Cal. 110.

It is doubtful if the future earnings of a husband are subject to a decree for alimony. 82 Cal. 110. But see 83 Cal. 460.

A publication in a newspaper charging a judge with lying and falsification in the trial of a case before him held contempt. 85 Cal. 603.

The finding of the court as to the ability of the defendant to pay alimony is conclusive as against *habeas corpus* proceedings. 83 Cal. 460.

The abuse of a process of replevin constitutes contempt under section 1209 of the Code of Civil Procedure. 84 Cal. 50.

See DIVORCE; HABEAS CORPUS.

CONTINUANCE.

Irregularity in granting a continuance to one defendant, and going to trial as to the other, is waived if not objected to. 68 Cal. 162.

Refusal of continuance because of the absence of witnesses beyond the county is not error, where no effort has been made to subpoena them. 70 Cal. 204.

A court may refuse a continuance asked for on the ground of the prior engagement of counsel. 75 Cal. 411; 76 Cal. 328.

It is a flagrant abuse of discretion, in an election contest, to refuse a continuance based on the affidavit of the election boards and 139 voters, showing that the ballots had been fraudulently changed, and asking for a few days to produce witnesses to show it. 79 Cal. 487.

Continuances are within the sound discretion of the court, and its action will not be disturbed unless there is an abuse of such discretion. 83 Cal. 645.

CONTRACTS.

I. CONSTRUCTION OF.

II. VALID AND INVALID CONTRACTS.

III. EVIDENCE OF.

IV. DAMAGES FOR BREACH OF.

V. HOW PLEADED.

VI. CONSIDERATION.

I. CONSTRUCTION OF.

The construction of all contracts must be reasonable. 77 Cal. 548.

A certain lumber contract held to be in the nature of an option. 68 Cal. 217.

No person is liable for a payment made in his behalf without his authority. 68 Cal. 91.

Letters may constitute a contract, so as to avoid the statute of limitation. 68 Cal. 466.

In a contract for services by the day, the plaintiff can only recover for the number of days' work performed. 70 Cal. 40.

Under the mechanic's lien law of 1885, damages cannot be recovered for a breach of a contract required to be recorded, but which was not. 70 Cal. 220.

An agreement to furnish, deliver, and sell water construed. 70 Cal. 572; 70 Cal. 616.

A promise to subscribe to a charitable institution is a mere offer, revocable before acceptance or by death. 70 Cal. 158.

Acceptance of an offer to sell railroad lands, made by circular, constitutes a complete contract, on which an action lies. 70 Cal. 484.

A contract to convey does not imply a right of possession before purchase. 70 Cal. 42.

Agreement to pledge personal property creates no lien without delivery. 71 Cal. 331.

In building contracts where extras are to be left to arbitration, such extras must be left to arbitration, and not to litigation. 72 Cal. 393.

Independent clauses of a contract may be performed without being affected by failure to perform other clauses. 72 Cal. 356.

Technical terms in a contract may be explained by parol. 72 Cal. 278.

Whether or not an executory contract amounts to a sale is a question of intention to be collected from the contract. 72 Cal. 293.

A written contract cannot be modified by a parol agreement. 75 Cal. 271; 81 Cal. 236.

One who agrees to sell a future crop of fruit gives an implied warranty as to the quality. 76 Cal. 212. But see 77 Cal. 236.

Certain amounts paid because of the failure of the party to perform his contract held improperly charged up against him. 77 Cal. 601.

A contract to build a sidewalk without giving quantity held not entire. 77 Cal. 319.

Where the parties cannot rescind, and become *in statu quo*, and one of them derives benefit from the labor of the other, the action of *quantum meruit* lies. 77 Cal. 319.

If a written contract is uncertain, a subsequent parol agreement defining it is admissible. 77 Cal. 319.

A joint contract for labor may be subsequently changed into a several contract, before the work is completed. 77 Cal. 418.

If a debt is assigned without notice to the debtor, and afterwards paid to the assignor, the assignee cannot recover. 77 Cal. 449.

A contract to haul at so much for the first year and so much for subsequent years is divisible as to price, but is entire as to terms. 78 Cal. 610.

Contract for the sale of fruit to be shipped by the buyer construed. 78 Cal. 439.

Where a contract of service is made and performance prevented, an action will lie for the value of the services. 79 Cal. 260.

An agreement expressly intended to "run with and bind the land" creates a lien upon the land, binding upon the promisor's successors. 80 Cal. 114.

An answer to a suit on a promissory note, setting forth that it was given on certain conditions that had not been complied with, and was without consideration, held sufficient as a defense to the action. 85 Cal. 322.

The payment of money may be made dependent on the performance of a condition by the party to whom it is to be paid. 85 Cal. 322.

A party cannot recover in *assumpsit* where he has voluntarily failed to comply with the terms of a special contract. 85 Cal. 105.

A written contract for the sale of land which does not except the growing crops includes such crops. 87 Cal. 313.

If a party accepts goods delivered to him without objection to their quality, he cannot raise such objection as cause for refusal to receive subsequent installments which are in accordance with the contract. 87 Cal. 249.

In order to make "time of the essence of the contract," it is not necessary that these express terms be used. It may appear from the contract as a whole or from equivalent expressions. 87 Cal. 203; 87 Cal. 275.

An oral agreement partially performed is not superseded by a subsequent memorandum in writing not inconsistent therewith. 87 Cal. 434.

Under a contract for the sale of land, providing a forfeiture of all rights in case the payments are not made in time, the vendor, notwithstanding such forfeiture, may sue for the amount of the purchase-money due. 87 Cal. 489.

A mortgage executed without legal consideration, and in mutual ignorance and mistake as to the law, is invalid. 85 Cal. 610.

Where a contract was made in this state, for the purchase of a mine in Mexico, for which a deed and possession was given, and the consideration was invested in this state, the courts have jurisdiction of an action to rescind such contract, on the ground of fraud. 85 Cal. 11.

When consent was given by mistake or through fraud, either party may rescind. 85 Cal. 11.

After rescission has been completed, the purchaser may seek the aid of the courts to secure the results of the rescission, regardless of the non-residence of the vendor. 85 Cal. 11.

A contract by which money is pooled for sixty days expires in sixty days, and the money may then be withdrawn by the payee. 81 Cal. 236.

A contract of "permanent" employment is not intended to be for life, or for any cer-

tain period, but merely at the will of both parties. 81 Cal. 596.

A action for divorce is an action on a contract, within the meaning of section 442 of the Code of Civil Procedure. 82 Cal. 413.

A written instrument supersedes all oral negotiations, unless in cases where the instrument is ambiguous, or an action is brought to reform it. 82 Cal. 474.

An executory oral agreement, altering a written contract for the sale of land, is void under section 1698 of the Civil Code. 82 Cal. 533.

A delay of one year and a half to rescind a conveyance of land, alleged to have been bought at a grossly inadequate price, through the conspiracy of the purchaser and others, is fatal to the cause of action. 85 Cal. 522.

The first requisite of rescission is prompt action; mere inadequacy of price is not sufficient to warrant a court in setting aside a sale. An offer before suit to return the purchase-money is a condition precedent to the maintenance of the action. 85 Cal. 522; 85 Cal. 110. But where the vendor is in default, notice of rescission and a demand for the deed is not necessary. 85 Cal. 518.

See ASSIGNMENT.

II. VALID AND INVALID CONTRACTS.

A contract for services regardless of dereliction of duty is val.d. 68 Cal. 37.

A married woman may contract as a *feme sole*. 70 Cal. 250.

A contract to pay an officer for securing evidence for the conviction of a criminal held valid. 70 Cal. 502.

Indebtedness caused by a loan for gambling purposes, when invalid. 73 Cal. 411.

Acceptance is a necessary element in taking a contract of sale out of the statute of fraudulent transfers. 70 Cal. 399.

Contracts obtained by means of pretended spiritual manifestations have presumptively been procured through undue influence. 72 Cal. 556.

An agreement to become man and wife is not invalid because it contains a promise not to make the marriage known until a future day. 75 Cal. 1.

A contract in restraint of trade held to be invalid. 76 Cal. 387.

A secret contract between employees will not invalidate their right to wages, if not injurious to employers. 76 Cal. 63.

Where a reward is offered, any person who becomes entitled to it may collect the same by law. 77 Cal. 87.

Failure to record a building contract makes it only void as between the parties thereto. It does not affect material-men or laborers' liens. 78 Cal. 193; 74 Cal. 625; 81 Cal. 170.

An executory oral agreement altering a written contract for the sale of land is void

under section 1698 of the Civil Code. 82 Cal. 533.

Circumstances under which money loaned for gambling is not recoverable. 73 Cal. 414.

A stipulation in a contract that the installments paid should be taken as liquidated damages for a breach of contract is void under sections 1670, 1671, and 3307 of the Civil Code. 87 Cal. 443.

III. EVIDENCE OF.

Parol evidence is not admissible to change a written contract. 69 Cal. 186; 81 Cal. 236.

An original complaint, afterwards amended, is not admissible as evidence. 69 Cal. 133.

Letters written by a party to the contract are admissible against him. 72 Cal. 251.

Parties signing a note as a copartnership cannot afterwards dispute the copartnership. 72 Cal. 544.

It is not error to exclude a supplementary promise made without any consideration. 79 Cal. 433.

Evidence to excuse fulfillment of a contract held admissible. 80 Cal. 146.

Where a complaint is on common counts, and the proof shows a special contract, a nonsuit should not be granted for variance. 82 Cal. 250. See 86 Cal. 605.

A judgment for defendant in an action on an implied contract for work and labor held not supported by the findings, and the case remanded with instructions to enter judgment for the plaintiff. 85 Cal. 605.

Parol evidence held admissible, not to contradict, but to explain, a certain contract. 86 Cal. 531.

In a suit on a contract made on certain conditions, held that a compliance with the conditions was proven. 86 Cal. 531.

See EVIDENCE.

IV. DAMAGES FOR BREACH OF.

In every breach of contract, the plaintiff is entitled to at least nominal damages. 71 Cal. 537.

Excessive damages should be reduced. 71 Cal. 509.

Judgment for damages for conversion of cattle held supported by the evidence. 73 Cal. 618.

Judgment for damages for the conversion of wood held supported by law and evidence. 73 Cal. 154.

A stipulation in a contract fixing damages is void, if readily ascertainable. 77 Cal. 467.

Generally, the damage for the use and occupation of land is the value of such use and occupation. 77 Cal. 467.

Consequential damages caused by breach of contract are not recoverable. 77 Cal. 22.

For breach of contract in failing to employ a teamster, damages, how measured. 78 Cal. 640.

In an action for damages, the breach of the contract must be alleged. 70 Cal. 75.

Damages which do not naturally flow from the breach of contract cannot be recovered without special averment. 71 Cal. 163; and in such cases it should be also shown that the defendant had previous knowledge of the circumstances. 71 Cal. 197; 71 Cal. 163.

Actions against a corporation for breach of contract may be brought in the places designated by section 16, article 12, of the constitution. 71 Cal. 488.

Damages for breach of contract must be reasonable. 71 Cal. 509.

An employee who works on contract may sue on a *quantum meruit*, if his employer repudiates the contract. 69 Cal. 643.

An employee dismissed for good cause is not entitled to compensation for services rendered since last pay-day. 69 Cal. 643.

In a suit for breach of contract, both the promise and the breach must be alleged. 70 Cal. 75.

In a suit to recover for services by the day, recovery can only be had for the days actually spent in work. 70 Cal. 40.

Damages for breach of contract not the natural result of the breach, must be specially pleaded, or cannot be proven. 71 Cal. 163; 71 Cal. 537.

Damages so remote as to be loss of merely possible profits are not recoverable. 71 Cal. 197.

Measure of damages for breach of warranty in the sale of a harvesting-machine. 83 Cal. 233.

V. HOW PLEADED.

All or any parties liable may be sued on a contract. 68 Cal. 363.

A contract may be declared on either *in hæc verbis*, or in substance, or according to its legal effect. 82 Cal. 654.

An employee dismissed for good cause is not entitled to compensation since last pay-day. 69 Cal. 643.

If a person is employed to work on shares and ousted, recovery may be had on a *quantum meruit*. 69 Cal. 643.

A counterclaim as against a contract must exist in behalf of the defendant when the suit was commenced. 72 Cal. 224.

Where performances of services have been prevented, an action on *quantum meruit* lies. 76 Cal. 60.

A complaint on an express contract may be amended so as to constitute one in *assumpsit*. 82 Cal. 250.

A complaint in *assumpsit* need not aver a promise to pay, for that which is implied by law need not be averred in pleading. 82 Cal. 209.

The statute of frauds is a matter of defense. 71 Cal. 331.

See PLEADING.

VI. CONSIDERATION.

Illegality of consideration must be specially pleaded, if not shown by the complaint. 68 Cal. 29.

The consideration for an agreement may be paid by a third party. 68 Cal. 116.

A written agreement need not recite consideration, nor need a complaint thereon allege consideration. 68 Cal. 611; 82 Cal. 471.

A deed is admissible in evidence without proof of the payment of the consideration for its execution. 69 Cal. 611.

A power of an attorney given for the consideration of an interest in the subject-matter is irrevocable. 70 Cal. 296.

Property purchased by a married woman with her separate funds becomes her separate property. 70 Cal. 282.

Services in securing a loan held sufficient consideration for a promise of commission. 70 Cal. 335.

Objection to inadequacy of consideration is waived by the due execution of a deed. 70 Cal. 608.

Failure of consideration, in whole or in part, is a good defense to a promissory note in the hands of a holder with notice. 71 Cal. 481.

A deed to a married woman, silent as to the amount of consideration, but "for her sole and separate use," is not conclusive on the issue of separate property. 71 Cal. 419; 70 Cal. 282. (See amendment to section 164 of the Civil Code, approved March 9, 1889.)

A deed without consideration, made under mistake as to its effect, will be set aside. 72 Cal. 207.

That the consideration of an instrument was really more than that recited therein, or paid, is no defense to a suit on such instrument. 72 Cal. 224.

Allegation that a contract was founded on a valuable consideration held sufficient without further specification, as against general demurrer. 73 Cal. 217.

Money loaned for the purpose of gambling may be recovered, if the game is not unlawful, and the money was not won by the plaintiff. 73 Cal. 414.

Inadequacy of consideration as an element to set aside a deed fraudulently obtained. 73 Cal. 157.

Cancellation of a debt is a valuable consideration. 74 Cal. 444; 75 Cal. 552.

So, also, an extension of time to pay indebtedness. 70 Cal. 250.

The recital of consideration in a deed is not conclusive as to good faith. 75 Cal. 525.

The pledge of a note executed without consideration is not protected like a purchaser without notice for value. 75 Cal. 86.

A grantee of land, where the purchase-money is advanced by a third person, becomes a trustee for such person. 75 Cal. 166. See 77 Cal. 330.

Forbearance to make claim against an

estate is no consideration for the promise of the widow to pay the claim. 76 Cal. 355.

Assignment of judgment without consideration held to make the assignee a trustee. 76 Cal. 312.

Illegality of consideration may be shown to prove that a deed was void. 76 Cal. 208.

The cancellation of one note is sufficient consideration for the execution of another by a third party. 76 Cal. 203.

A written contract imports consideration, and may be for the benefit of a third person without his knowledge. 77 Cal. 38; 79 Cal. 606.

The consideration of a promissory note cannot be shown by cross examination against plaintiff's objection. 77 Cal. 324.

Property conveyed fraudulently, without consideration, cannot be retained on the ground that the grantee was a child, and not a party to the fraud. 77 Cal. 106.

Ratification requires no consideration. 77 Cal. 267.

Specific performance will not be decreed unless there was an adequate consideration for the contract, and such adequate consideration is that which is fair. 77 Cal. 114.

A covenant not to sue must have consideration. Section 1541 of the Civil Code applies only to formal releases. 78 Cal. 552.

A deed cannot be rescinded for failure of consideration, without fraud, where such consideration is a future performance. 78 Cal. 126.

Want of consideration is a purely legal defense to a promissory note. 79 Cal. 262.

The recital of consideration in a deed, in the absence of fraud or mistake, is conclusive evidence to uphold the conveyance. 79 Cal. 530.

One who adds his name as a maker to a promissory note after its delivery, without any new consideration, is not liable thereon. 80 Cal. 139.

Valuable information may be the legal consideration of an agreement. 81 Cal. 328.

A pre-existing indebtedness may constitute a valuable consideration. 82 Cal. 132. So may suretyship. 82 Cal. 278.

A party who purchases by bill of sale in consideration of assuming certain debts cannot avoid such debts. 82 Cal. 474.

VII. RESCISSION OF CONTRACTS.

Remedies of vendee to recover purchase-money, where the vendor fails to convey title, pointed out. 70 Cal. 429.

A vendor who has received part payment cannot rescind for non-payment without returning the money paid him. 71 Cal. 226.

An offer to rescind must be made within a reasonable time after the discovery of the cause therefor. 72 Cal. 233.

A contract obtained under fraudulent misrepresentation may be rescinded if such

representation was the inducement to its execution. 74 Cal. 502.

Where one party breaks a contract, the other may discontinue it. 78 Cal. 640.

A contract for the benefit of a third person cannot be rescinded so long as the consideration is being properly performed. 77 Cal. 38.

He who rescinds for fraud must do so promptly on its discovery, and show that he has been damaged. 78 Cal. 389; 78 Cal. 202.

A purchaser cannot rescind a sale on the ground of fraud unless he offers to return the property sold. 78 Cal. 552.

Mere expressions of opinions do not constitute fraudulent representations, where both parties have the same opportunity to investigate. 81 Cal. 1.

A person who fails to rescind a fraudulent contract on discovering the fraud waives the fraud and the damages. 81 Cal. 7.

A false representation not believed or accepted by the opposite party is not ground for rescission, or relief in equity. 82 Cal. 351.

Failure to seek rescission for two years, and until the value of the property is increased, will prevent the intervention of a court of equity. 82 Cal. 351.

Where a false representation was innocently made, and was not the sole inducement to the contract, it is not sufficient grounds for rescission. 82 Cal. 351.

See EQUITY; FALSE REPRESENTATION; FRAUD; MISTAKE; RELEASE.

CONTRACTS AS MODIFIED BY CUSTOM.

See CUSTOM.

CONTRIBUTION.

An indorser has a right of action against his co-indorser for contribution without waiting to be sued. 74 Cal. 362.

On dissolution of partnership and settlement of account, a partner who has paid the partnership debt may sue his copartner for contribution. 78 Cal. 225. But such partner cannot revive an outlawed claim. Id.

CONVERSION.

A finding that the plaintiff was not, but that the defendant was, the owner of the building converted, held sufficient. 68 Cal. 528.

Insufficiency of description must be objected to by special demurrer. 70 Cal. 500.

Fixtures may be severed and converted. 70 Cal. 3. If such conversion is wrongful, no demand before suit is necessary. 70 Cal. 5.

An action for conversion or of replevin may be brought for personal property fraud-

lently purchased. In such case, the ownership is not changed. 70 Cal. 440.

An action lies for conversion against the owner of the land who removes his mortgaged crop. 70 Cal. 196.

A sheriff who takes the property out of the hands of a pledgee without paying his claim is liable for conversion. 71 Cal. 68.

Compensation for time and money spent in pursuit of converted property can only be allowed on showing that the money was properly spent, and the amount thereof. 71 Cal. 68.

Where personal property is loaned for a particular use, diversion from that use is conversion. 72 Cal. 565.

In such case, a variance between the complaint and the answer, which did not mislead the defendant, is immaterial. 72 Cal. 565.

The conversion by an attorney of the funds of a client is cause for suspension or disbarment. 72 Cal. 359.

Evidence held to sustain a verdict in an action for the conversion of cattle. 73 Cal. 618.

Wood cut under contract with a defendant, but not delivered to him, cannot be attached in a suit against him, and such attachment amounts to conversion. 73 Cal. 164.

A sale by an executor without an order of court amounts to unlawful conversion. 74 Cal. 536.

A warehouseman who fails to deliver property deposited with him is guilty of conversion. 75 Cal. 349.

In an action for conversion, possession is merely evidence of title, and may exist without title. 76 Cal. 565.

The fact that a sheriff has reason to believe that certain property belongs to a debtor is no defense in an action against him for its conversion by the owner. 79 Cal. 181.

Failure by the commissioner of emigration to pay money collected by him into the state treasury is proof of its conversion. 79 Cal. 84.

In estimating the value of property converted, its cost price is relevant to aid in the estimation of its value. 79 Cal. 181.

In an action for the conversion of a crop, certain evidence was held admissible, and other evidence improper. 79 Cal. 575.

In an action for conversion of mining stock, certain allegations as to its value held sufficient to support a judgment for plaintiff. 80 Cal. 460.

A corporation that cancels stock without authority is liable for its conversion. 82 Cal. 1.

Compensation for the pursuit of the property lies both in the action of replevin and conversion. 85 Cal. 191.

The taking of plaintiff's property and

refusal to return it on demand sufficiently shows conversion. 85 Cal. 191.

Exemplary damages are recoverable both in replevin and conversion. 85 Cal. 191.

A factor who receives wines and refuses to deliver it to the owner, or set up any lien thereon, is guilty of conversion. 87 Cal. 15.

When one person converts to his own use the personal property of another, the latter may waive the tort, and sue in *assumpsit*. 87 Cal. 15.

See **CONTRACTS; DAMAGES; MORTGAGE.**

CONVEYANCE.

See **DEED.**

CONVICTION.

See **CRIMINAL LAW.**

CORPORATIONS (NOT MUNICIPAL).

The statute of limitation runs in favor of a stockholder, as against an assessment, no matter how such an assessment was levied. 68 Cal. 353.

The capital stock of a corporation which has been fully paid for is assessable. 69 Cal. 214.

Acquiescence in the sale of delinquent stock takes away the right to object. 69 Cal. 213.

A certificate of incorporation which omits to state the facts required by law is no proof of a corporation in fact. 70 Cal. 163.

Stockholders can only bring suit on behalf of the corporation after a *bona fide* request on its officers, and their refusal. 70 Cal. 222. But see 83 Cal. 579.

A mortgage executed in the name of a corporation by its president and secretary, under the corporate seal, is presumed to be authorized, and the burden of proof is on him who disputes it. 70 Cal. 144.

The act of 1880 requiring the directors of mining corporations to post balance-sheets does not render them liable for each separate failure to do so. 71 Cal. 541.

Place of trial against corporations is governed by section 16, article 12, of the constitution. 71 Cal. 488. See 73 Cal. 182.

A certified copy of articles of incorporation from the secretary of state is proof of corporate existence. 72 Cal. 379.

A party who deals with an association as a corporation is estopped from denying its existence. 72 Cal. 379.

A stockholder can maintain suit on behalf of the corporation against its directors for fraudulent management. 72 Cal. 49.

A bill in equity by stockholders against the corporation and its directors and others for an accounting is not demurrable where it appears that it would be useless to apply to the directors to institute such an action, in the name of the corporation, and the complaint is in other respects sufficient. 83 Cal. 579; 84 Cal. 61.

Stock of a corporation purchased by it at a delinquent sale is the property of its stockholders, and not of such corporations. 72 Cal. 32.

A note executed to a banking corporation in payment of a subscription to its stock is not void. 72 Cal. 55.

A savings bank cannot pay dividends out of interest not actually collected. 72 Cal. 199.

A corporation is not bound to submit its books to the attorney-general except under order of court. 72 Cal. 28.

In a suit against directors of a mining corporation for failure to post monthly reports, held, the judgment against defendant was supported by the evidence. 72 Cal. 305.

The failure of a mining corporation to file a copy of its articles of incorporation in the county where it operates does not prevent it from defending an action for wages. 73 Cal. 599.

An action against a corporation to have a deed declared a mortgage should be brought where the property is situated. 73 Cal. 182.

A stockholder may avoid liability for assessment by the sale or assignment of his stock before levy. 74 Cal. 167.

Can such transfer be made intentionally to an insolvent person, *quære*. 74 Cal. 167.

A stockholder is bound by the articles and by-laws, whether he signed them or not. 74 Cal. 571.

In an action against mining directors for failure to post a monthly statement, judgment on the pleading was held properly granted. 74 Cal. 298.

The rule that when facts in a complaint are presumably within the knowledge of the defendant he must answer them positively applies to corporations. 74 Cal. 298.

Subscribers to savings-bank stock held not entitled to dividends. 74 Cal. 598.

Water corporations organized for the purpose of supplying water only to its stockholders cannot have its prices regulated by the board of supervisors. 74 Cal. 571.

A water corporation may adopt by-laws limiting the use of water to its stockholders. 74 Cal. 573.

A bequest to the "Old Ladies' Home" conducted by the Sisters of Mercy corporation, held to mean such corporation. 75 Cal. 329.

An assessment levied at an adjourned meeting of the board of directors, of which special notice was not given, is invalid unless all the directors are present. 76 Cal. 153.

The allegation that an assessment was levied for the purpose of "freezing out" a stockholder is no cause for a dissolution of the corporation. 76 Cal. 24.

Shares of stock in a corporation are personal property. 76 Cal. 537.

An injunction will not lie to restrain the sale of delinquent stock merely because the notice was insufficient; the remedy is under section 347 of the Code of Civil Procedure. 76 Cal. 26.

Irrigation districts are *quasi* public corporations. 76 Cal. 360.

A corporation may be compelled to transfer stock sold by the sheriff. 76 Cal. 537.

A promissory note signed "A. Hassett, President," is the obligation of the man, and not of any corporation. 76 Cal. 207.

In *quo warranto* to forfeit a franchise, corporate existence must be alleged. 77 Cal. 360.

Section 299 of the Civil Code construed as relating to religious corporations. 83 Cal. 12.

The fact that a corporation has not filed a copy of its articles in the county is a matter of defense, and not of demurrer. 77 Cal. 69.

The recitals in a United States patent is sufficient proof of corporate existence. 77 Cal. 69.

In an action by stockholders against directors for fraud, the objects of the incorporation must be set out. 77 Cal. 408.

A corporation seal on an instrument placed by a proper officer is presumptive of authority for its execution. 77 Cal. 283.

The president of a corporation can only execute a mortgage under resolutions of the directors made when the board is duly assembled. 78 Cal. 629.

The act of 1880 relating to mining corporations requires both the action of the directors and the owners of two thirds of the capital stock. 78 Cal. 630.

A promissory note of a president payable to himself, purporting to be the note of the corporation, is invalid unless authorized or ratified by the board of directors. 78 Cal. 289.

Directors interested personally in a resolution are not competent to vote thereon. 78 Cal. 289.

The rule of ostensible agency does not apply in favor of the assignee of a note signed by the president without authority. 78 Cal. 290.

A corporation, beneficial or otherwise, can only be dissolved in the manner prescribed by law, and its property is to be controlled by its duly elected officers. 78 Cal. 166.

A corporation sole cannot enjoin a sale of land for street assessment, unless it holds the legal title. 79 Cal. 288.

A corporation sole cannot acquire title by adverse possession hostile to itself. 79 Cal. 289.

A corporation sole has no need of a corporation seal, or secretary, or treasurer, or by-laws. Its will regulates its acts. 79 Cal. 286.

A corporation liable for money may levy assessments to pay it, and such debt may be due a stockholder. 79 Cal. 285.

A mining corporation may transfer all its property in return for shares of stock in another corporation. 79 Cal. 286.

An instrument purporting to be the assignment of an account executed in the name of a corporation by its secretary will not be presumed to be authorized. 79 Cal. 77.

The ratification of a void act cannot avail after suit is commenced. 79 Cal. 78.

Service of notice of an appeal from a justice's court where the respondent is a corporation may be served on its manager, even if it has an attorney in the case. 79 Cal. 103.

The omission of the word "company," in a suit against a corporation, will not invalidate the attachment. 79 Cal. 556.

It is a sufficient defense to a suit by a banking corporation that it has not complied with the requirements relating to publication and sworn statements. 79 Cal. 463.

It seems that a foreign corporation doing business in this state may have its property here subjected to proceedings in involuntary insolvency. 79 Cal. 248.

An action lies by members of a religious society against its directors for a fraudulent diversion of its property to another denomination. 79 Cal. 365. The constitution and by-laws of the church are evidence to show for what purpose the property was acquired and dedicated. 79 Cal. 366. In such cases one may sue for the benefit of many, under section 352 of the Code of Civil Procedure. 79 Cal. 373.

Reclamation and irrigation districts are public corporations to the same extent. 79 Cal. 351.

The signature of a president and secretary of a corporation must be rejected, in the absence of proof of authority from the board. 79 Cal. 388.

An allegation that a plaintiff is a corporation may be proven by evidence that it was recognized and acting as such. 80 Cal. 181.

An agreement to subscribe for corporation stock on its organization is binding though the subscriber refuses to participate in the final organization. 80 Cal. 19.

Such agreement does not make a subscriber a member of the corporation, but only a debtor for the amount subscribed, and such payment may be enforced by an agent acting as trustee, to whom it is payable. 80 Cal. 22.

A water company may be incorporated

under the general laws applicable to all corporations. 80 Cal. 20.

The fact that a corporation had failed to comply with section 299 of the Civil Code is not ground for general demurrer, and can only be reached by special plea in abatement. 80 Cal. 333; 80 Cal. 68.

Section 299 of the Civil Code relative to filing copy of articles of incorporation in the county does not apply to foreign corporations. 80 Cal. 333.

Foreign corporations are not required to file copy of their articles with the secretary of state or county clerk. 80 Cal. 336.

When the evidence shows that a meeting of the board of directors was called and conducted as the statute directs, an assessment levied by it will be held valid. 80 Cal. 375.

A written agreement to work a mine on shares is not a lease; it does not create the relation of landlord and tenant, and does not require the consent of the owners of two thirds of the corporate stock. 80 Cal. 558.

Under the act of 1880, the directors of a mining corporation cannot convey the grounds of the company without consent of the holders of two thirds of the capital stock. 80 Cal. 310; 81 Cal. 356.

The foregoing rule applies to ditches used as appurtenances to the mine. 80 Cal. 310.

Directors hold a fiduciary relation, and are governed by sections 2230 and 2234 of the Civil Code, which make it a fraud for a trustee to act, when he has an interest adverse to the beneficiary, without his free sanction. 81 Cal. 303.

Directors cannot make allowances to themselves if a stockholder dissents; not even when the same is fair and honest. 81 Cal. 303.

Certificates of stock indorsed in blank pass by delivery without transfer on the books. They are not negotiable securities. 81 Cal. 311.

Under section 309 of the Civil Code "the directors must not create debts beyond the subscribed capital stock," under penalty of being liable therefor to its creditors. 81 Cal. 502.

Stockholders do not legally own the property of the corporation. Therefore, when one corporation sells property to another for stock, such stock cannot be distributed among its stockholders even by unanimous consent. 81 Cal. 380.

The capital stock of another company owned by a corporation can only be distributed on its dissolution. 81 Cal. 378.

The law requiring the directors to post a balance-sheet on the first Monday of each month is clear and mandatory. Nothing short of impossibility will excuse their failure to comply with it. 81 Cal. 232.

An agent who conspires to obtain corporate property by fraud cannot set up such fraud

subsequently, to defeat the title acquired thereby by the corporation. 81 Cal. 356.

A general power of attorney does not authorize the agent to transfer the property to himself. 84 Cal. 131.

Stock can only be legally transferred in accordance with section 324 of the Civil Code. 84 Cal. 131.

A corporation is liable for stock illegally canceled. 84 Cal. 131.

A benevolent society cannot divide up the corporate property among its members. 84 Cal. 61.

The rule that before stockholders can sue for corporate property they must request the trustees to do so does not prevail when such a request would be idle and useless. 84 Cal. 61.

Corporations may have their charter forfeited on *quo warranto* proceedings. 84 Cal. 114.

The superior court had no authority to appoint a receiver upon a judgment in *quo warranto*. The judgment ends the proceedings. 84 Cal. 327.

The assets of a dissolved corporation belong, after the payment of its debts, to the stockholders and directors. 84 Cal. 327.

It is no part of the functions of a court to supply the want of penal legislation. 84 Cal. 327.

A receiver of a dissolved corporation can only be appointed at the request of a stockholder or creditor. 84 Cal. 327.

The only penalty which the law attaches to contracts of natural persons in restraint of trade is to make them non-enforceable. 84 Cal. 527.

The sureties on the bond of the secretary of a banking corporation are bound by the by-laws, which define his duty. 81 Cal. 528.

Stockholders of a corporation are primarily liable for its debts. Such liability is not extended by transactions between the corporation and its creditors, in the nature of extension, etc. 82 Cal. 650.

If the complaint against several stockholders demands less than three hundred dollars against each, the superior court has no jurisdiction. 82 Cal. 652.

The existence of a corporation *de facto* cannot be questioned by a mere trespasser. 82 Cal. 184.

In a suit against an individual to compel the transfer of stock, the corporation is not a necessary party. 82 Cal. 628.

The president of a corporation who is also its general manager under the by-laws has authority to buy machinery and give its promissory note therefor, without a resolution of the board. 86 Cal. 390.

As no lien exists for unpaid subscription for stock, an attachment in such case is proper. 82 Cal. 603.

A complaint against stockholders for the indebtedness of the corporation must state

the *pro rata* of each defendant's indebtedness. 87 Cal. 29.

A complaint against a stockholder for indebtedness to the corporation in several counts must state the existence of the corporation in each count. 87 Cal. 29.

The fact that one of the trustees of a municipal corporation was one of the committee to whom the application for the franchise was referred, and was also a subscriber to the stock of the proposed company, renders the franchise void. 87 Cal. 597.

In an action against a corporation, the statements of its secretary having charge of its business are admissible against it. 87 Cal. 324.

See BENEFICIAL ASSOCIATIONS; CHURCH; MUNICIPAL CORPORATIONS.

COSTS.

An error in awarding costs which does not work injury to appellant is no cause for reversal. 68 Cal. 272.

A conveyance expressly taken subject to legal costs renders the grantee liable therefor. 68 Cal. 383.

A memorandum of costs must be filed within five days after the decision is known, although no notice thereof has been given. 69 Cal. 559. By "decision" is meant the findings and conclusions of the court. 69 Cal. 559.

Failure to file undertaking for costs, in libel and slander, does not go to the point of jurisdiction. 69 Cal. 527.

An order for a change of venue may be conditioned on payment of costs and revoked *ex parte*. 69 Cal. 536.

In injunction suits, the allowance of costs is discretionary. 70 Cal. 519.

The clerk cannot enter judgment for costs pending a motion to retax. 71 Cal. 168.

An agreement to pay court costs as part of the consideration for a deed is enforceable against purchaser. 68 Cal. 383.

A judgment for costs without filing or serving the memorandum on the opposite party is without jurisdiction, and void. 71 Cal. 254.

Costs and counsel fees with which to prosecute an appeal may be awarded a wife by the superior court in a divorce case. 71 Cal. 330.

The act of February 9, 1886, regulating fees in San Francisco, and providing that the successful party shall be allowed five per cent on the amount recovered, if still in force, applies to cases litigated on demurrer. 72 Cal. 124.

An offer of compromise under section 997 of the Code of Civil Procedure cannot affect costs unless the trial is concluded more than five days thereafter. 72 Cal. 394.

A judgment for costs less than three hundred dollars is not appealable. 73 Cal. 297.

A judgment for contempt is not void because it awards costs in favor of the relator. 73 Cal. 486.

Where equitable relief is refused because of plaintiff's fraud, costs should not be awarded him. In such case the court abused its discretion. 74 Cal. 565.

An execution for costs on a mere judgment outlaws in five years. 74 Cal. 106.

A cost-bill improperly served by mail cannot be the basis of a judgment for costs. 76 Cal. 618.

An appeal from a judgment for costs contained in an unintelligible transcript will be dismissed. 78 Cal. 509.

Attorney's fees in a mechanic's lien case are not part of the costs, but are an incident to the judgment. 78 Cal. 449; 74 Cal. 532.

A dismissal of a slander suit for failure to file the undertaking is erroneous if such undertaking was filed at the time of motion to dismiss. 78 Cal. 571.

Where a defendant disclaims in a suit to quiet title, the plaintiff is not entitled to costs. 83 Cal. 589.

The reversal of a judgment too favorable to one defendant does not entitle him to costs. 79 Cal. 332.

Services of an expert accountant are not the proper subject for costs, unless he is specially appointed by the court. 79 Cal. 265.

A small overcharge in the judgment, by clerical error, will cause it to be modified without costs on appeal. 81 Cal. 625.

Section 297 of the Code of Civil Procedure, as to offers to allow judgment, construed. 84 Cal. 214.

In a bill of interpleader, the plaintiff need not offer to pay the costs of a previous suit. 81 Cal. 145.

In action to quiet title to separate lots claimed by separate parties, the cost caused by unnecessary counts in the complaint should be paid by the plaintiff. 81 Cal. 127.

Judgment for costs cannot be reviewed on appeal without a motion to tax and an exception to the ruling thereon shown by bill of exceptions. 82 Cal. 19.

When an appeal from a judgment on a mechanic's lien has been dismissed, the court below should be instructed to allow additional attorney's fees as part of the costs. 84 Cal. 537.

Money paid out to a shorthand reporter for making a transcript of evidence upon an order of the court is recoverable as costs. 86 Cal. 493.

Where the transcript is made by a party at his own request, the charge therefor is not recoverable as costs. 86 Cal. 493.

Though the amount recovered in a suit may not affect the jurisdiction, it may yet affect the recovery of costs. 86 Cal. 459.

See **WITNESSES**.

CO-TENANCY.

See **JOINT TENANCY; PARTITION; TENANTS IN COMMON**.

COUNSEL FEES.

See **ATTORNEY; COSTS; HUSBAND AND WIFE; MECHANICS' LIENS; MORTGAGE**.

COUNTERCLAIMS.

A cross-complaint to which there is an answer inconsistent with its allegations does not entitle defendant to judgment on the pleadings. 69 Cal. 133.

The mere fact that a pleading is called a cross-complaint does not make it so, even by stipulation. 69 Cal. 133.

A defendant sued jointly cannot set up an individual demand as a counterclaim. 70 Cal. 108.

A lessee may reconp damages by counterclaim against suit for rent. 70 Cal. 79.

In an action on a promissory note an unsettled partnership account cannot be set up as a counterclaim, nor any claim that does not exist at the commencement of the action. 72 Cal. 224.

The fact that in another suit a claim is being litigated will not prevent it from being set up as a counterclaim. 72 Cal. 540.

But in such cases defendant may not be entitled to affirmative relief. 72 Cal. 540.

A counterclaim must exist in favor of the defendant at the commencement of the action. 72 Cal. 224.

Where the counterclaim consists of damages too remote to be recoverable, the court may properly exclude all evidence relating thereto. 85 Cal. 142.

In an action to recover for services in making an abstract of title, a counterclaim for damages for failure to make the abstract in time held too remote to be admissible. 85 Cal. 142.

See **CONTRACT; CROSS-PLEADINGS [under PLEADINGS]**.

COUNTY.

Verification of a claim against a county held sufficient. 69 Cal. 533.

An injunction will not lie on the suit of a tax-payer to restrain the board of supervisors from paying improper claims against the county. 72 Cal. 517.

Kern County bonds held invalid. 83 Cal. 149.

In a suit against members of a board of supervisors for unlawfully allowing claims, a complaint held insufficient, because stating a mere legal conclusion. 72 Cal. 520.

A board of supervisors may adjourn from

time to time without loss of jurisdiction. 73 Cal. 365.

Under the constitution, the revenue provided for a given year must be applied thereto, before any prior indebtedness is paid. 74 Cal. 258; 75 Cal. 502.

A resolution of a board of supervisors relating to the building of a jail held in conformity to the county government act. 74 Cal. 502. A board of supervisors may rescind a contract for fraudulent representation. 74 Cal. 502.

Certain county bonds held unauthorized and void. 74 Cal. 332.

County bonds are only legal when issued by express authority of the legislature. 74 Cal. 332.

The County Government Act, requiring the appointment of a doctor for the indigent sick and poor, does not require that he should be a medical graduate. 78 Cal. 141.

A county is not liable in damages caused by the breaking of a bridge of a county road, and a warrant on such a claim is illegal. 78 Cal. 301.

A county warrant is not negotiable. 78 Cal. 301.

An order of the board of supervisors transferring money from a general fund to a road fund is illegal and void. 78 Cal. 493.

Supervisors of the thirty-third class can only claim one mileage for each session of the board. 78 Cal. 270.

Land purchased by a county and used for the county hospital is dedicated to public use, and not subject to be lost by adverse possession. 79 Cal. 375.

The act providing for the formation of Orange County upon a two-thirds vote of its electors is constitutional. 81 Cal. 499.

Subdivision 15 of County Government Act of 1889 held unconstitutional. 84 Cal. 71. Counties are not municipal, but rather political, corporations. 81 Cal. 489.

If the complaint describes certain property as being in a certain section and range, the court will take judicial knowledge in what county it is situated. 86 Cal. 210.

See APPEAL; BOND; COUNTY GOVERNMENT ACT; LICENSE; MUNICIPAL CORPORATIONS; PUBLIC OFFICERS; SUPERVISORS.

COUNTY CLERK.

See PUBLIC OFFICERS.

COUNTY GOVERNMENT ACT.

See COUNTY; PUBLIC OFFICERS.

COUNTY SEAT.

See COUNTY; INJUNCTIONS.

COUNTY TREASURER.

See PUBLIC OFFICERS.

COURTS.

Terms of court as abolished by the constitution. 69 Cal. 541.

See JURISDICTION.

COURT REPORTER.

See CONSTITUTIONAL LAW.

COVENANTS.

See CONTRACTS; DEEDS; LEASES.

CREDITORS.

See DEBTOR AND CREDITOR; INSOLVENCY; PROBATE LAW.

CRIMINAL LAW.

- I. MISDEMEANORS.
- II. FELONIES.
- III. BAIL.
- IV. PROCEEDINGS BEFORE MAGISTRATE.
- V. INFORMATION AND INDICTMENT.
- VI. DEMURRER AND PLEA.
- VII. PROCEEDINGS AT TRIAL.
- VIII. DISTRICT ATTORNEY.
- IX. JURORS.
- X. EVIDENCE AND PROOF.
- XI. INSTRUCTIONS.
- XII. VERDICT AND JUDGMENT.
- XIII. NEW TRIALS AND APPEALS.

I. MISDEMEANOR.

Ordinary misdemeanors must be tried in the justice's court, even after a successful appeal to the superior court. 72 Cal. 14; 78 Cal. 556.

Superior courts have no jurisdiction to try ordinary misdemeanors. 78 Cal. 556; 80 Cal. 544; 82 Cal. 182.

A person will not be discharged on *habeas corpus* because he was refused a jury trial in a justice's court. 82 Cal. 454.

The offense of obtaining money under false pretenses is not within the jurisdiction of the police court. 82 Cal. 273; 84 Cal. 468.

A constable may execute a justice's court warrant outside of his county, if properly indorsed. 82 Cal. 187.

A judgment imposing a definite fine, and directing imprisonment until paid, to con-

time for a definite term, held good as against *habeas corpus* proceedings. 84 Cal. 165.

The misdemeanor of conspiracy under section 181 of the Penal Code is not within the jurisdiction of the superior court. 84 Cal. 468.

The crime of obtaining property of the value of nine thousand dollars under false pretenses is not within the jurisdiction of the police court. 84 Cal. 468.

When the judgment for a misdemeanor is for a fine only, it may also direct that the defendant be imprisoned until the fine be satisfied, specifying the time. 85 Cal. 36.

An information for misdemeanor is barred by the expiration of one year, if the defendant has not been absent from the state. 85 Cal. 86.

A municipal ordinance against visiting a gambling-house held not invalid. 86 Cal. 232.

The jurisdiction of the police court is not affected by the omission of the complaint to set forth the time of the offense. 87 Cal. 423.

The act providing for the sentencing of certain prisoners to the house of correction is not unconstitutional. 87 Cal. 78.

II. FELONIES.

A defendant cannot justify an assault with a deadly weapon, unless the use of it was necessary to prevent great bodily harm. 69 Cal. 601.

It is not the duty of a person to avoid doing a lawful act, even though he believes that it will cause his opponent to attempt to commit a crime, which he will be compelled to resist by violence. 69 Cal. 70.

A second offense of petit larceny is a felony, and in such case the plea of not guilty puts both the crime and the previous conviction in issue. 74 Cal. 81.

Goods sold conditionally, with the agreement that title should remain in vendor until paid for, may be the subject of larceny by the vendee. 83 Cal. 501.

III. BAIL.

After conviction of felony, the accused is not entitled to bail, as a matter of right, pending appeal. 68 Cal. 176.

Before the supreme court will admit to bail pending appeal, application must be made to the trial court. 70 Cal. 34.

The supreme court will not interfere in the matter of bail unless it appears unreasonable to refuse. 82 Cal. 183.

In fixing bail the character of the crime is the chief element to be considered. 82 Cal. 183.

IV. PROCEEDINGS BEFORE MAGISTRATES.

A warrant of commitment will be presumed to exist from the order of commitment. 68 Cal. 576.

Mere informalities before the committing magistrate involving no substantial right will not warrant the quashing of an information. 69 Cal. 601.

That the accused has been already arrested on proceedings still pending will not affect the jurisdiction of the magistrate, or the validity of the information. 71 Cal. 384.

A magistrate may hold the accused for any offense whatever which he has been shown to have committed. 73 Cal. 252.

The name given on the preliminary examination, if fictitious, may be changed to the true name in the information. 73 Cal. 252.

A party cannot be arrested on a complaint in the form of information and belief, without any facts tending to show guilt. In such cases the accused will be released on *habeas corpus*. 74 Cal. 164.

A warrant of commitment issued on a charge of kidnaping and assault should show the name of the party injured; but this defect will not entitle the prisoner to be discharged on *habeas corpus*. 85 Cal. 309.

The warrant of commitment may be amended so as to correspond to the offense proven. 85 Cal. 309. See also 85 Cal. 362.

A stenographer need not be sworn. 75 Cal. 101.

Sufficient certification of stenographer. 75 Cal. 101.

Examination before magistrate is not necessary as a prerequisite to indictment. 76 Cal. 328.

Under section 869 of the Penal Code, the reporter's notes must be certified to be a correct statement of the testimony. 77 Cal. 213.

As a witness, the reporter can refresh his memory from his notes. 77 Cal. 213.

Where a commitment is invalid because of an omission in the indorsement, it may be returned to the magistrate for correction. 84 Cal. 598.

Neglect in adding to the commitment an order for admission to bail will not render it, or the information thereon, subject to be set aside. 84 Cal. 598.

A second information filed after the first was set aside because of invalid commitment is not necessarily invalid. 84 Cal. 598.

The jurisdiction of a person acting as a committing magistrate will be presumed. 84 Cal. 616.

The fact that the accused had been once before arrested for the same crime, and discharged by the magistrate, is no bar to a second arrest or trial. 77 Cal. 183.

In "misdemeanors not otherwise provided for," police and justice's courts have exclusive jurisdiction. 78 Cal. 556.

A defendant cannot be discharged on *habeas corpus* after commitment upon re-examination, on the ground that a new complaint should have been filed. 85 Cal. 362.

Error in the ruling of a committing magis-

trate is subject to review in the superior court, or on appeal, but is not ground for discharge on *habeas corpus*. 85 Cal. 362.

On a charge of felony, a magistrate should give the accused time to employ counsel, but not decided as to whether he should provide him with counsel if too poor to employ one. 80 Cal. 296.

A person cannot be discharged under *habeas corpus* after his conviction, on the ground that he was never examined before a magistrate. 83 Cal. 558.

A commitment which fails to have the indorsement required by law is defective, and cannot support an information. 84 Cal. 598.

V. INFORMATION AND INDICTMENT.

An information cannot be set aside on the ground that the offense was not committed in the county, unless it so appears on its face; this point can be reached under a plea of not guilty. 68 Cal. 500.

Section 1382 of the Penal Code, as to the time in which an indictment or information must be filed, and the time in which the defendant must be tried, allows no discretion to the court. 85 Cal. 515.

An information for bribery in the language of the code is sufficient. 68 Cal. 549.

An indictment in the language of the statute is sufficient. 84 Cal. 567.

Information charging injury to public jail held sufficient as stating but one offense. 68 Cal. 434.

A defendant cannot be prosecuted by information until after examination and commitment. 68 Cal. 576.

A commitment in the language of section 872 of the Penal Code held sufficient. 68 Cal. 576.

An indictment for forgery in a single count setting out a series of acts, either of which would be forgery, does not charge more than one offense. 84 Cal. 567.

Setting aside. 68 Cal. 500; 69 Cal. 540; 69 Cal. 601.

Misnomer in as to the injured person. 69 Cal. 226. See 85 Cal. 309.

Presumptions as to. 68 Cal. 576.

Sufficiency of. 72 Cal. 402; 72 Cal. 384.

Illness of a judge is good excuse for a trial not having been had for sixty days after filing information. 69 Cal. 540.

A trial on an amended information without arraignment or plea is error. 69 Cal. 184.

The district attorney may file an information against a defendant for any offense disclosed by the deposition. 85 Cal. 309.

The trial of a case cannot be prevented by prohibition for mere irregularities. 69 Cal. 105.

Information for assault with intent to murder is sufficient if in the language of section 952 of the Penal Code. 70 Cal. 98.

An information for carrying on a game of "tan" need not aver defendant's ownership, or employment. 70 Cal. 515.

The sufficiency of the complaint will not be considered on *habeas corpus* unless the complaint is made part of the record. 83 Cal. 388.

An indictment charging a promissory note to have been executed by one person is not sustained by evidence showing that he and another executed it jointly. 70 Cal. 529.

An information charging an offense in the language of the code held sufficient. 70 Cal. 116.

An indictment in the language of the code held sufficient, even though involving legal conclusions. 71 Cal. 195.

The act of 1872 to punish for stealing gold-dust was continued in force by the code. 71 Cal. 15.

An allegation of ownership sufficiently proven by possession. 72 Cal. 402.

Information for rape held sufficient. 70 Cal. 473.

Several successive acts in an assault held as but details of a single offense. 70 Cal. 467.

Information for arson held sufficient. 71 Cal. 48.

A complaint for vagrancy held sufficient in form and substance. 72 Cal. 384.

The fact that a complaint groups certain acts which, combined, constitute a crime, does not violate the rule that only one offense must be charged. 72 Cal. 384. See 70 Cal. 467.

On an information for burglary, without specification of degree, a verdict of guilty as charged is insufficient. 73 Cal. 580.

Clerical error in information held immaterial. 73 Cal. 7.

Information for murder held sufficient. 73 Cal. 355.

Information for receiving stolen property need not allege value. 73 Cal. 220.

Information for libel held sufficient in a proceeding of *habeas corpus*. 73 Cal. 120.

A commitment holding for manslaughter may be the basis of an information for murder, if the testimony warrants it. 74 Cal. 642.

Indictment of an election officer for breach of duty held sufficient. 75 Cal. 627.

In such cases it must appear that the error was committed knowingly and fraudulently. 75 Cal. 627.

An information for robbery describing the property as money shows it to be personalty. 75 Cal. 98.

An information charging robbery "by means of force and fear" need not allege it against the will of the person robbed. 75 Cal. 98.

A complaint for violation of an ordinance need not describe the ordinance in full. 76 Cal. 587.

An information for larceny must allege

the thing to be the property of some person other than the defendant. 76 Cal. 460.

Larceny is not included in the crime of burglary. 76 Cal. 57.

Irregularity in formation of grand juries is not ground to set aside indictment. 76 Cal. 328.

A motion for an arrest of judgment can only be founded on defects in the indictment or information. 77 Cal. 30.

Failure to indorse the defendant's name on the indictment as a witness is not ground for setting it aside. 77 Cal. 618.

An information for burglary may designate the building as owned by a "company." 77 Cal. 445.

A demurrer to an indictment for embezzlement held properly sustained. 77 Cal. 120.

Information for obtaining money under false pretenses, if in the language of the statute, is sufficient. 77 Cal. 173.

Indictment for forging a will held sufficient. 77 Cal. 464.

Sufficiency of information or complaint are not generally themselves subjects for inquiry on *habeas corpus*. 77 Cal. 164.

Information for perjury, essentials of. 77 Cal. 12.

An information charging entrance into several rooms of a house, with intent to commit larceny, charges but one offense. 77 Cal. 445.

As to what conduct constitutes a crime depends wholly on the statute. Constructive crimes are repugnant to our laws. 77 Cal. 164.

The police power of the legislature cannot extend to punishing a person for advertising his business. 77 Cal. 168.

The legislature cannot delegate the power of declaring what acts will constitute a misdemeanor. 77 Cal. 168.

The distinction between accessory before the act and the principal is abrogated, even as to any distinctions as to the mode of information. 78 Cal. 84.

The strictness required at common law as to criminal pleading is not required under our code. 78 Cal. 84.

It may be possible to describe an offense without correctly naming the person injured. 79 Cal. 178.

A crime cannot be split up and prosecuted in parts, nor can a defendant be convicted of two distinct crimes growing out of the same identical act. 79 Cal. 428.

An information will not be set aside because the accused had been once before arrested for the same crime and discharged on *habeas corpus*, unless the evidence at both hearings was the same. 79 Cal. 554.

An information charging a person with conducting a banking game for money states no offense, because the statute requires it to be "played" for money. The statute itself is valid. 80 Cal. 153.

Information for larceny describing the property as the property of two persons, without mention of partnership, is sufficient. 80 Cal. 2:9.

Information for arson held sufficient. 81 Cal. 616.

Information for an assault with a deadly weapon need not specify the kind of weapon. 81 Cal. 650.

In such case, that the assault "was committed upon the person of one John Goffey" shows that a human being was the subject. Information in the language of section 245 of the Penal Code held sufficient. 81 Cal. 18.

An information for burglary which omits the word "feloniously" is valid. 81 Cal. 209.

An information for an attempt to extort money by a threatening letter held sufficient. 81 Cal. 275.

An information charging a crime in terms of legal conclusions, without setting forth the facts, is insufficient to support a conviction. 81 Cal. 158.

An information is not always sufficient if it is couched in the language of the statute. 81 Cal. 158.

Information for the larceny of cattle may allege the agister to be the owner. 81 Cal. 135.

An information charging malicious mischief by the use of a poisonous substance is sufficient, if in the language of the statute; such a crime may be punished by imprisonment in the state prison. 81 Cal. 210.

Under the codes, as at common law, husband and wife are one, and cannot be charged with conspiracy between them alone. 82 Cal. 107.

An information for the embezzlement of the funds of an association need not specify persons. 82 Cal. 585.

Where an information is filed without reasonable or probable cause, the accused may be released on *habeas corpus*. The commitment of a proper officer on a charge of kidnapping the person he arrested is without probable cause. 82 Cal. 245.

An information signed by a *de facto* assistant district attorney appointed by a board of supervisors is valid. 85 Cal. 432.

An information charging burglary with intent to commit larceny need not state the degree, and does not charge two offenses. 86 Cal. 238.

An information setting forth the facts constituting the crime of embezzlement held sufficient. 86 Cal. 393.

An information for perjury against an insolvent debtor held sufficient. 82 Cal. 607.

Misnomer of person on whom the assault was alleged to be committed. 87 Cal. 281.

VI. DEMURRER AND PLEA.

A defendant may demur to an indictment

or information on the ground that it is barred by the statute of limitation. 85 Cal. 86.

A void information cannot be the basis of such a trial as would constitute "once in jeopardy." 68 Cal. 18.

A plea of once in jeopardy is proper, if a party is duly placed on trial and the jury discharged without his consent or without legal necessity. 70 Cal. 17.

If a plea of not guilty is made by defendant's attorney, and entered as if made personally, the error is immaterial. 71 Cal. 395. See 83 Cal. 374.

The reversal of a judgment for failure to find the degree of crime cannot be the basis of a plea of "once in jeopardy." 73 Cal. 580.

A void verdict, except in certain cases, amounts to an acquittal, and may be pleaded in bar to a subsequent suit, if the jury are discharged without the defendant's consent; and such consent may be presumed. 76 Cal. 57.

The record of an arraignment need not show an interpreter was appointed. 84 Cal. 484.

A defendant indicted for murder and convicted of manslaughter, who secures a new trial, cannot plead "once in jeopardy" as to either offense. 77 Cal. 213.

A plea of "former acquittal" and "once in jeopardy" must be entered on the minutes; if not, the jury need not consider them. 77 Cal. 30.

A conviction set aside on appeal cannot be the basis of a plea of "once in jeopardy" when a new trial is ordered. 77 Cal. 176.

A conviction for assault is no bar to a conviction for robbery, although the acts were simultaneous. 77 Cal. 7.

The fact that the accused had been once arrested for the same crime, and discharged by the magistrate, is no bar to a second arrest or trial. 77 Cal. 183.

Plea of once in jeopardy held not sustained. 84 Cal. 441; 84 Cal. 468.

An acquittal on the ground of variance cannot be the basis of a defense of once in jeopardy. 79 Cal. 178.

When a defendant stands mute, it is the duty of the court to have a plea of not guilty entered. 84 Cal. 484.

A plea of once in jeopardy is sustained against a conviction for libel, when the former conviction was for a different paragraph of the same article. 79 Cal. 428.

An information is not always sufficient if couched in the language of the statute. It must inform the accused, with reasonable certainty, of the nature of the accusation, so that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. 81 Cal. 158.

The fact that the deceased and defendant were both Indians does not deprive the superior court of jurisdiction. 85 Cal. 432.

A demurrer on the ground that a defendant has not been legally committed by the magistrate is not allowable. The point must be made on the notice to set aside the information. 82 Cal. 620.

A demurrer to an information should be overruled where the part excepted to might be stricken out without rendering the information insufficient. 87 Cal. 122.

VII. PROCEEDINGS AT TRIAL.

Mere variance of date held immaterial. 68 Cal. 434.

An inspection of clothing by jury will be presumed to be by consent of both sides. 68 Cal. 576.

An order not prejudicial to the accused held immaterial. 68 Cal. 623.

Absence of defendant from court-room for a moment held not prejudicial. 68 Cal. 623.

The fact that the jury whispered to each other while viewing the place of the crime held not sufficient for a reversal of judgment. 68 Cal. 623.

A homicide is justifiable when necessarily committed in the lawful attempt to arrest a person who has committed a felony, with or without a warrant. 85 Cal. 231.

An objection to a question as to witness's reputation which omits "general" must specify, or it will be disregarded. 68 Cal. 623.

A witness cannot be cross-examined as to what he said at the coroner's inquest. 68 Cal. 584.

The question, Whom did you see watching around? held not leading. 68 Cal. 584.

A witness may be asked whether a judgment and sentence of felony has been pronounced against him. 68 Cal. 584.

Reading law books to the jury is an immaterial error, even though the court refuses to stop it, if the jury are instructed to disregard such matter. 69 Cal. 226.

Postponement of a trial to secure absent witnesses for prosecution is within the discretion of the court. 69 Cal. 226.

The law requiring the court to admonish the jury at each adjournment ought to be strictly complied with. 84 Cal. 598.

The exclusion of witnesses from the courtroom is discretionary. 70 Cal. 515.

Application for continuance for absence of witness residing out of the county must show issuance of subpoena. 70 Cal. 204.

The court may order the jury to view the premises where the crime occurred. 71 Cal. 602; in such case a person may be appointed to point it out. *Id.*

The question "to whom did the libel refer" is entirely for the jury; it is error to permit a witness to say who was intended. 71 Cal. 194.

On a change of venue, what papers need to be transferred. 71 Cal. 602.

All proceedings will be presumed regular until the contrary is shown. 72 Cal. 117.

Improper statements of the district attorney must be objected to in the trial court, or such objection is waived. 83 Cal. 419.

Proceedings when the charge of prior conviction was subsequently withdrawn. 73 Cal. 511.

State courts can try Indians not members of any tribe having tribal laws. 73 Cal. 635.

The court has discretion to allow a defendant to testify after the jury has been charged. 85 Cal. 568.

A variance of three months between the information and the proof held immaterial. 73 Cal. 220.

The law limiting cross-examinations applies to defendant's testimony. 73 Cal. 243.

Questions to a doctor as to standard medical books held properly ruled out as immaterial. 73 Cal. 243.

Questions as to whether certain hypothetical facts would indicate insanity held proper. 73 Cal. 243.

An order that all persons, with certain exceptions, should be excluded from the courtroom held not in violation of the right of a public trial. 73 Cal. 222.

A variance between information and proof as to locality held immaterial. 74 Cal. 188.

A delay granted after information is filed, at request of defendant, is not cause for a discharge under section 1382 of the Penal Code. 74 Cal. 575.

The defendant has a right to have the judge accompany the jury when viewing the *locus in quo*. 74 Cal. 569.

The witness cannot be impeached by his statements made at the preliminary examination, and reduced to writing, unless it be first shown him. 74 Cal. 389.

A refusal for continuance because the counsel is not prepared is not erroneous. 75 Cal. 411.

In what cases public prejudice renders a change of venue proper. 76 Cal. 328.

Application for change of venue may be renewed from time to time. 76 Cal. 328.

The absence of defendant's counsel engaged in trying another case is no ground for continuance. Absence of an attorney in attendance on the legislature is only ground for continuance when his engagement dates prior to the session. 76 Cal. 328.

The court may curtail the examination of jurors when their disqualification is clear. 76 Cal. 328.

The defendant's counsel may be required, in his opening statement, to confine himself to the facts, the effect thereof, and his conclusions therefrom. 76 Cal. 328.

A deposition taken pending a void information cannot be afterwards used in evidence on a new information. 84 Cal. 598.

It is the duty of the superior court to grant orders to take depositions outside of the state, if material. 84 Cal. 23.

A motion to strike out improper evidence

may be refused. It should be objected to in time. 84 Cal. 484.

The allowance of leading questions is discretionary with the court. 76 Cal. 328.

Counsel for defendant may be forbidden from commenting on other verdicts in other cases tried in the same place, and from reading law to the jury. 76 Cal. 328.

The court may refuse to settle bills of exceptions during the trial. 76 Cal. 328.

The court cannot be too careful in guarding both itself and the jury from all suspicions of prejudice. 76 Cal. 328.

The court properly refuses to allow counsel to argue law to the jury in his opening address. 77 Cal. 213.

Challenge of grand jury for bias. 77 Cal. 618.

The rule of secrecy as to proceedings before a grand jury is intended only for the protection of them and their witnesses. 77 Cal. 618.

The competency of a witness as to insanity is a matter for the court, within its discretion. 77 Cal. 147.

An accused who is not tried within sixty days after the information is filed is not entitled to his discharge, where the delay was caused by the fact that the court was engaged in trying other cases. 77 Cal. 445.

In a prosecution for murder, if the accused consents to the exhibition of the clothing of the deceased, he waives all objections thereto. 77 Cal. 529.

It is error to refuse to strike out an answer not responsive to the question, if prejudicial to the accused. 78 Cal. 317.

If no exception is taken to the testimony on the trial of a challenge to the jury for actual bias, the ruling thereon cannot be reviewed. 83 Cal. 380.

A witness cross-examined as to what he said at a previous trial has a right to have the statement read to him, if in writing. 78 Cal. 317.

Where the district attorney, in arguing for the admission of improper testimony, purposely attempts to prejudice the jury, it is error to refuse to order him to desist. 78 Cal. 317.

The jurisdiction of the court does not depend on the manner in which the accused is brought before it. The legality of an extradition cannot be considered. 78 Cal. 345.

A writ of prohibition will lie to prevent a superior court from trying a criminal action of which it has no jurisdiction. 78 Cal. 556.

If the prisoner is present when judgment is pronounced, it is all that is required. It may be entered afterwards in his absence. 79 Cal. 631.

The superior court has no jurisdiction in common misdemeanors. 78 Cal. 556; 80 Cal. 544.

A change of venue because of public

prejudice may be based on a prisoner's own affidavit. 80 Cal. 296.

Subpoenas for witnesses to prove such prejudice, how obtained. 80 Cal. 296.

There is no authority permitting a jury to be taken to view a steer, alleged to be one of the cattle stolen, but objections must be taken to it, or it is waived. 80 Cal. 538.

It is at best a hazardous proceeding, the sending of a jury to view the premises where an alleged crime has been committed. Great caution should be used in permitting it. 80 Cal. 541.

A court may order the attendance of a witness from the state prison. 82 Cal. 456.

Subdivision 2 of section 1033 of the Penal Code, authorizing a change of the place of trial, on the application of the people, without the consent of the defendant, is unconstitutional. 87 Cal. 348.

VIII. DISTRICT ATTORNEY.

It is the duty of the district attorney to see that a defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence.

Equally with the court, the district attorney as the representative of the law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the court into distrust. The desire of every lawyer to win his case should be overcome by the conscientious desire of a sworn officer of the court to do his duty, and not go beyond it. 78 Cal. 329.

An admission of the district attorney that he is prejudiced against a witness he is cross-examining, though highly improper, is not ground for a new trial. 84 Cal. 408. See 85 Cal. 383.

The court has discretion to allow private counsel to assist the district attorney, with his consent. 87 Cal. 348.

Course of the district attorney and judge held ground for a reversal of the judgment. 79 Cal. 415.

IX. JURORS.

A remark of a juror to certain persons held not improper. 68 Cal. 576.

The discharge of the jury caused by the sickness of one of them is not ground for a plea of "once in jeopardy," or acquittal. 85 Cal. 383.

A verdict of "guilty" should be set aside where the jury have been influenced in their verdict by any person, through the medium of a newspaper or otherwise. 85 Cal. 350.

The fact that jurors slept in different rooms while the sheriff slept in the corridor is not a violation of the rule that they should be kept in a body. 68 Cal. 823.

It is unlawful to have the jury visit the scene of the crime, unless the accused is taken along. 68 Cal. 623; 70 Cal. 193.

Hypothetical questions and cross-questions may be put to a juror. 71 Cal. 548.

Questions not allowed for the purpose of showing actual bias held error. 72 Cal. 390.

Where a juror becomes sick, a new juror may be sworn in his stead. 72 Cal. 490.

Injury will not be presumed because the jury talked about the case among themselves. 73 Cal. 345.

A slight departure from the mode of drawing and returning a jury held not prejudicial. 73 Cal. 355.

It is proper to ask a juror who confesses to having a decided opinion whether it is against the defendant. A refusal to permit it, which causes the defendant to exhaust his last challenge, is error. 73 Cal. 313.

When a juror in his deliberation reads unauthorized matter relating to the case, it is receiving evidence out of court, under section 1181 of the Penal Code. 74 Cal. 482.

It is the duty of the jury to reconcile conflicting evidence, if they can. 76 Cal. 521.

The formation of an opinion from newspaper reports does not disqualify a juror. 77 Cal. 494.

The drinking of intoxicating liquors by a jury deliberating in a capital case, even though served with the meal, is ground for a new trial, regardless of quantity and effect. 78 Cal. 317.

It is the province of the jury to render a verdict in view of all the evidence. 81 Cal. 566.

An affidavit of the misconduct of the jury made upon information and belief held insufficient. 86 Cal. 225.

A juror is not necessarily incompetent because he is not impartial. 87 Cal. 348.

The prosecution may be permitted to challenge a juror, after he has been sworn, for good cause. 87 Cal. 117.

X. EVIDENCE AND PROOF.

Evidence in a case held not tending to prove conspiracy. 68 D. 113.

A witness cannot be impeached by asking him as to his having been arrested for a felony. 68 Cal. 101.

The defense of an *alibi* is not one requiring more than ordinary scrutiny or treatment different from that of any other defense. 85 Cal. 39.

Correspondence of foot-prints, though stale, held proper evidence. 68 Cal. 576.

A witness cannot testify as to general reputation, until it is shown that he knows it. 69 Cal. 601.

The burden of proof never shifts from the prosecution, unless in case of new and independent facts not in the original transaction. 69 Cal. 601.

A witness may be cross-examined as to any

statement made by him in his direct testimony. 69 Cal. 169.

A witness cannot testify as to his understanding of the meaning of words used in a conflict. 69 Cal. 169.

Statement of deceased made instantly on being shot held admissible, though not in presence of defendant. 69 Cal. 180.

Evidence against an attorney charged with embezzlement. 69 Cal. 226.

Fraudulent intent as an element in embezzlement. 69 Cal. 226.

Misnomer in party injured is immaterial, and kind of money need not be specified or proven. 69 Cal. 226.

Evidence of an expert as to the game of tan held improper. 85 Cal. 580.

A charge of assault with a deadly weapon does not involve proof of intent. 70 Cal. 98.

Evidence of self-defense held not sufficient to warrant disturbing a verdict of guilty of manslaughter. 83 Cal. 380.

A conspiracy cannot be proven against a co-conspirator by the admissions of the other; but when the conspiracy is once proven, the declaration of any conspirator accompanying any act in carrying out the design is evidence against his confederate. 86 Cal. 483.

Where a party is convicted of an assault with a deadly weapon under an information to commit murder, the exclusion of evidence as to the drunkenness of the defendant is not error, because intent is not specifically involved. 70 Cal. 98.

Evidence of drunkenness must be received with great caution, and only to show mental condition and ability to form deliberate intent. 70 Cal. 641.

Drunkenness cannot be considered to determine an assault with a deadly weapon with intent to inflict great bodily harm. 70 Cal. 641.

A defendant cannot rely upon his books as evidence to show that property which is charged to have been stolen has been purchased. A litigant cannot strengthen his case by his own declaration, either written or verbal. 86 Cal. 483.

Evidence as to sanity of defendant at the time of the trial is admissible. 85 Cal. 300.

A deadly weapon is one likely to produce great bodily harm. 70 Cal. 641.

Where one, charged with larceny, as a witness in his own behalf testifies to purchasing the property from a third person, he may be cross-examined as to such person's whereabouts. 83 Cal. 374.

A person who cuts another with a knife cannot be properly convicted of a simple assault. 70 Cal. 641.

An immaterial variance in the description of the forgery and the forgery itself is not ground for reversal. 70 Cal. 61.

Gambling instruments may be used to illustrate the nature of the game. 70 Cal. 515.

Ordinarily, evidence as to the defendant's

immoral character is improper and prejudicial; but where the defendant himself so testifies, it is without prejudice. 70 Cal. 521.

Section 1105 of the Political Code casts upon a party charged with homicide the burden of proving justification, or circumstances of mitigation. Any evidence that will raise a reasonable doubt is sufficient. 83 Cal. 380.

A promissory note is personal property. 70 Cal. 529.

Evidence of rape on a girl under ten years need not show resistance. 70 Cal. 467.

Where the foot-marks are given in evidence, testimony to show that they may have been made by others is admissible. 70 Cal. 582.

A Brussels bond payable on dates fixed by lot is not a lottery ticket. 70 Cal. 632.

A grand juror must testify on a motion to set aside an indictment for irregularity. 71 Cal. 212.

The unchastity or consent of the child is immaterial in an action against a procurer. 71 Cal. 611.

Evidence of first marriage in cases of bigamy. 71 Cal. 263.

Evidence that defendant was married under an *alias* held proper. 71 Cal. 263.

Marriage, once proven, is presumed to continue till death or divorce is shown. 71 Cal. 263.

A guardian may be described as the owner of the property of his ward. 71 Cal. 89.

An ear-mark on an animal is some evidence, though not recorded. 71 Cal. 17.

The testimony of a sham accomplice need not be corroborated, to convict. 71 Cal. 17.

Killing without much provocation implies malice. 71 Cal. 1.

Verdict of murder in the second degree held sustained by evidence. 71 Cal. 1.

A check drawn with no funds to meet it is a "false token," under section 1110 of the Penal Code. 70 Cal. 116.

Homicide being proven, mitigating circumstances must be shown, by a preponderance of evidence. 71 Cal. 1; 71 Cal. 602. *Per contra*, 80 Cal. 180; 81 Cal. 142; 80 Cal. 296. The law presumes malice in homicide. 71 Cal. 602.

Immoral habits of either defendant or deceased not admissible. 71 Cal. 569.

Good faith essential to excuse homicide in self-defense. 71 Cal. 569.

Evidence which is relevant is not barred by the fact that it tends to connect the accused with another crime. 71 Cal. 565.

A witness who was present at an assault may testify as to whether the defendant appeared rational. 71 Cal. 351.

Evidence that a defendant voluntarily declared that he would plead guilty is admissible, if the only inducement was being told that if he was guilty, and so pleaded, he would get a short sentence. 72 Cal. 583.

Where the evidence is conflicting, the verdict will not be disturbed. 72 Cal. 490.

Dying declarations taken down in shorthand held admissible. 72 Cal. 490.

An *alibi* must be proven by a preponderance of evidence. 72 Cal. 623.

Leading questions may be put to an ignorant or stupid witness. 72 Cal. 59.

A witness called to impeach a statement, by showing other inconsistent statements, may be cross-examined as to yet other statements. 73 Cal. 345.

Conviction may be had on circumstantial evidence. 73 Cal. 511.

Property obtained by false representation held larceny, if secured with felonious intent to steal. 73 Cal. 378.

Private inspection by a juror of some of the things used as evidence will not be presumed prejudicial. 73 Cal. 405.

Evidence as to venue held sufficient. 73 Cal. 405.

A party who confesses a prior conviction is entitled to have all reference thereto omitted at the trial. 73 Cal. 548.

Dying declarations held made under sense of impending death. 73 Cal. 403.

Error in permitting the wife to testify against the husband is cured by the defendant testifying to the same effect. 73 Cal. 635.

Evidence held sufficient to show assault with deadly intent. 73 Cal. 323.

Moral insanity held to be no excuse for crime. 73 Cal. 222.

In a trial for one offense, evidence of an offense committed in another county is inadmissible. 74 Cal. 94.

In a charge of obtaining false affidavits to be used as evidence, actual intent must be shown. 74 Cal. 306.

A defendant's declaration, when part of the *res gestæ*, is admissible in his favor. 74 Cal. 575.

On cross-examination, it is proper to show the hostility of the witness, even if it indirectly shows some facts material to the defense. 74 Cal. 30.

Evidence showing that the defendant went armed may be met by evidence that he had armed himself for his own protection. 74 Cal. 30.

A witness who has been robbed may be asked if he suspected that the defendant had any intention of robbing him, but the error in this case is held immaterial. 74 Cal. 389.

A conspiracy may be proven by circumstantial evidence. 75 Cal. 407.

In order to constitute larceny, the property must be carried away, but any removal of property not attached to something else is sufficient. 75 Cal. 385.

A defendant may be asked, on cross-examination, if he had been convicted of felony. 76 Cal. 385.

Evidence of attempting to obstruct a railroad track held sufficient for conviction. 75 Cal. 570.

An information for rape alleging force and violence is sustained by proof that the defendant administered an intoxicating substance. 75 Cal. 323. In such case evidence that the injured party made complaint while it was recent is proper. 75 Cal. 3.3.

Identity of person is presumed from identity of name. 75 Cal. 99.

A defendant in his own behalf cannot be compelled to testify to admissions, unless first shown to be voluntary, no matter what the purpose of the examination may be. 75 Cal. 415.

In evidence of a written admission, testimony is proper to show that the accused at the time declared she was innocent. 75 Cal. 415.

Resistance is not necessary to constitute the crime of larceny from the person. 76 Cal. 460.

Larceny is not included in the crime of burglary. 76 Cal. 57.

Express malice is necessary to constitute murder in the first degree. 76 Cal. 281.

Threats, or a quarrel, however ancient, is admissible to show malice. 76 Cal. 573.

The absence of a deposition is not ground for continuance, where the facts are proven by others, and not contravened. 76 Cal. 328.

Medical books are not admissible in evidence. 76 Cal. 328.

What facts are admissible as evidence of conspiracy. 77 Cal. 7; 77 Cal. 494.

The condition of an accomplice on the day after the crime is admissible after proof of the conspiracy. 77 Cal. 494.

All documentary evidence may be read to the jury. 77 Cal. 618.

If a document is offered for a special purpose, it may be so limited in the instructions. 77 Cal. 618.

Flight as an evidence of guilt. 77 Cal. 147.

A conviction for assault requires evidence showing intent, ability, and attempt. The same is true of an assault with a deadly weapon. 77 Cal. 293.

In a trial for false imprisonment, the prosecution must prove imprisonment, but the illegality will be presumed. 77 Cal. 570.

The signing of the name of another is not of itself false personation. 77 Cal. 436.

On a trial for obtaining goods under false pretenses, a false representation, calculated to mislead, is relevant. This intent may be gathered from acts and conduct. To constitute the offense, there must be intent to defraud, actual fraud, false pretense for perpetrating the fraud, and the property must have been given because of the false pretense. 77 Cal. 173.

The taking away by a pledgor of pledged

property, openly, under mistake of fact, is not larceny. 77 Cal. 171.

In such case the actual intent is a question for the jury. 77 Cal. 171.

An objection going to the qualifications of an expert does not reach the point of the incompetency of the evidence. 77 Cal. 529.

No declaration of a conspirator, except what is made during the conspiracy and in carrying it out, is competent evidence against his co-conspirators. 77 Cal. 494.

A conversation not shown to relate to the alleged crime is not admissible. 77 Cal. 494.

One who has seen a placard may be allowed to give his opinion as to its identity. 77 Cal. 494.

Declarations made by the deceased prior to the homicide are not admissible. 77 Cal. 494.

Evidence that a dying declaration was made in the expectation of death. 77 Cal. 1.

On trial for obtaining goods under false pretense of credit, evidence that he had no such credit is proper. 77 Cal. 173.

A written statement of the evidence of defendant before a grand jury admitted by him to be correct is admissible against him. 77 Cal. 618.

A defendant may be cross-examined to test his credibility to the same extent as in the case of other witnesses. If he denies the charge, he may be asked if a letter is in his handwriting, or as to whether he did not threaten to commit the offense. 78 Cal. 84.

The clothing worn by the deceased at the time of the homicide is admissible as part of the *res gestæ*. 78 Cal. 41.

Evidence as to bribery held competent. 78 Cal. 169.

Where, to prove a certain fact, a conversation with a third person must be shown, such evidence is admissible, and an exception to the rule as to hearsay testimony. 78 Cal. 169.

It is error to allow a witness to testify as to what he has learned of the defendant's reputation since his arrest. 78 Cal. 169.

When the defendant testifies biographically, he may be asked, on cross-examination, if he was ever arrested before. 78 Cal. 169.

The evidence in a case of burglary held sufficient. 79 Cal. 554.

On a charge of an assault with a pistol to commit murder, evidence that the accused procured another person at the same time to stab the victim is proper as part of the *res gestæ*. 79 Cal. 553.

On a trial for poisoning, it is prejudicial error for the judge to so question witnesses as to create an impression that he thought the defendant guilty. 79 Cal. 415.

Certain evidence in corroboration of a charge of rape held admissible. 79 Cal. 625.

Evidence of previous crimes, if not objected to, held not error. 79 Cal. 625.

A warrant of extradition need not contain a copy of the indictment or the complaint. If regular on its face, it is presumptively valid, on *habeas corpus*. 79 Cal. 95.

An assault without actual intent to commit rape, but with the intention to commit seduction, is simple assault. 80 Cal. 306.

In a trial of a charge of assault to commit rape, lewd and immoral conduct of the defendant with other girls is inadmissible. 85 Cal. 174.

In order to show the offense of an assault to commit rape, force or intimidation must be shown, unless the female is under the age of consent. 85 Cal. 174.

Where an act requires a particular intent to be criminal, such intent must be alleged and proven. 80 Cal. 41.

In a trial for an assault to commit murder, the burden of proving justification is not on the defendant, as in trials for murder. 80 Cal. 41.

Evidence as to what constitutes a banking game held sufficient. 80 Cal. 153.

Counterfeiting Bank of England notes is punishable under section 480 of the Penal Code. 80 Cal. 285.

The fact that counterfeiting is a crime under the federal laws does not preclude punishment under the state law. 80 Cal. 285.

Evidence of embezzlement by assignee for benefit of creditors. 80 Cal. 52.

An offer to return the money is no defense to a charge of embezzlement. 80 Cal. 52.

A mere preliminary question is not obnoxious because somewhat leading. 95 Cal. 421.

In a trial for larceny, proof of felonious intent held insufficient to convict. 80 Cal. 131.

Taking community property which is under the husband's control from the hands of his wife, with intent to steal it, is larceny. 80 Cal. 46.

The question of criminal intent is a matter solely for the jury. 80 Cal. 46.

Evidence of mere trespass by the deceased is no defense to homicide. 80 Cal. 34.

Hypothetical question to an expert, not based on the evidence, is improper. 80 Cal. 34.

In a homicide over a mining claim, evidence as to the amount of defendant's work is incompetent. 80 Cal. 34.

A witness may be impeached by proof that he testified differently before a coroner's jury. 80 Cal. 160.

Justification or mitigating circumstances need only be proven to create a reasonable doubt of guilt. 80 Cal. 160. Overruling 61 Cal. 395; 63 Cal. 422.

Intention is presumed from what the acts indicate. 80 Cal. 160.

Flight as tending to prove guilt. 80 Cal. 160.

Circumstances of mitigation need not be proven by preponderance of evidence. 80 Cal. 296.

The crime of receiving stolen property does not depend on the value of the property. 80 Cal. 538.

In a trial for robbery, variance between the information and proof as to the ownership of the property is immaterial. 80 Cal. 205.

A defendant cannot be cross-examined concerning other crimes committed by him. 81 Cal. 113.

Evidence to prove the venue of the crime held sufficient. 81 Cal. 275.

The deposition of a witness, taken at the preliminary examination, who cannot be found, and has probably left the state, may be read at the trial. 85 Cal. 421.

Variance as to the contents of a threatening letter held not material. 81 Cal. 275.

Facts constituting fraud must be pleaded with particularity in both civil and criminal cases. 81 Cal. 158.

An instruction that mitigation or justification must be proved by a preponderance of evidence is erroneous. 81 Cal. 142. Affirming 80 Cal. 160; 80 Cal. 296.

Alleged "dying declarations" held not admissible. 81 Cal. 142.

In a trial for perjury, an uncompleted sentence in a bail bond held not sufficient to sustain the charge. 81 Cal. 201.

The fact that a defendant has pleaded guilty and withdrawn it is not evidence as an admission or confession. 82 Cal. 617.

Evidence did not warrant the conviction of any crime against a person who killed another in the act of forcibly preventing him from harvesting his crop, sown by him on land in his exclusive possession. 82 Cal. 38.

A confession made under the advice of the sheriff is not voluntary. 84 Cal. 598.

Confessions caused by the inducements held out by persons in authority are always inadmissible on grounds of public policy. 84 Cal. 598.

Testimony necessary to corroborate an accomplice need not be strong. 84 Cal. 480.

Wounds, and declarations showing a sense of impending death, held sufficient. 84 Cal. 484.

Flight as an evidence of guilt may be rebutted by showing it to be caused by dread of pursuit from the friends of the assaulted person. 84 Cal. 276.

Evidence to prove that the relatives of the accused sought to bribe a prosecuting witness is not admissible. 84 Cal. 276.

Where an officer is charged with the homicide of a prisoner, an inference of guilt cannot be drawn from his neglect to search the deceased for weapons. 85 Cal. 231.

A witness cannot be asked, for the purpose

of degrading him, whether he had not spent a certain night in a house of ill-fame many months after the date of the alleged crime. 84 Cal. 651.

A witness cannot be contradicted on irrelevant on collateral matters, for the purpose of eliciting something on which to impeach him. In such case the court should not allow any contradictory evidence. 84 Cal. 651.

Where the evidence, even as to murder, is conflicting, the verdict will not be disturbed. 84 Cal. 573.

A question as to whether a certain thing was not apt to give rise to trouble is objectionable, as calling for the inference or opinion of the witness. 84 Cal. 573.

Expert evidence as to how far off powder-marks could be made held admissible. 84 Cal. 573.

A court, in its discretion, may allow a witness to testify as to what he had testified to on a previous occasion. 84 Cal. 573.

A presumption that an unlawful act was committed with unlawful intent is destroyed when a reasonable doubt of guilt is raised by the evidence. 86 Cal. 144.

Previous conversations held by defendant, not connected with the particular crime, but of a general threatening character, held admissible. 86 Cal. 403.

Upon a trial for embezzlement, evidence is admissible to show that the defendant had committed previous acts of embezzlement against the same person. 86 Cal. 393.

A defendant in a case of homicide need only prove circumstances of excuse, justification, or mitigation, so as to create a reasonable doubt of his guilt. A preponderance of evidence is not necessary. 86 Cal. 144.

When the supreme court has reversed an order granting a new trial after a conviction for crime, the accused must be sentenced for such crime. 84 Cal. 441.

Evidence to support a conviction of grand larceny held sufficient. 84 Cal. 291.

Evidence of obtaining property under false pretenses as to a bank account held insufficient. 84 Cal. 37.

The crime of obtaining property under false pretenses is not within the jurisdiction of the police court. 84 Cal. 468.

Evidence as to false misrepresentations as to title of property held sufficient to sustain a conviction for obtaining money under false pretenses. 84 Cal. 468.

Where a defendant admits a prior conviction, it is error to introduce the portion of the indictment that charges it. Such error is not cured by an instruction to ignore it. 84 Cal. 449.

On a charge of stage robbery, evidence that at one time the accused was in possession of burglars' tools is not admissible. 84 Cal. 449.

It is not admissible to allow an expert to

testify as to how a certain game of "bunco" is played, if the same was not that actually played by the defendants. 85 Cal. 378.

A plaintiff who has testified as to an injury may be asked on cross-examination as to whether she called for a doctor. 87 Cal. 464.

A trespasser on a train is not justified in shooting a brakeman who attempts to put him off, when he can get off with safety. 87 Cal. 281.

Evidence that the defendant believed that the deceased was armed cannot be rebutted by the evidence that he was not in the habit of carrying arms, or had refused to go armed on the morning of the homicide. 87 Cal. 348.

Evidence to show the peaceable character of the deceased cannot be given until it has first been attacked. 87 Cal. 349.

Evidence wholly incompetent, but admitted without objection, cannot be rebutted against objections. 87 Cal. 349.

Evidence of a conversation with which the defendant has not been shown to have been connected should be stricken out on motion. 87 Cal. 349.

Evidence of a conversation of a witness with the defendant relating to threats of the defendant towards the witness is incompetent against the defendant, it not appearing that the conversation was communicated to the deceased. 87 Cal. 349.

A certified copy of the entries in a justice's docket is *prima facie* evidence of the facts stated, and admissible in an action for malicious prosecution. 87 Cal. 629.

Evidence that the defendant was informed that the deceased was a dangerous man is competent as tending to show that he believed that he was in great bodily danger; but it is not competent merely to prove that defendant was warned to look out for the deceased. 87 Cal. 349.

The mere proof of the homicide does not cast upon the accused the burden of proving that the killing was justifiable or was only manslaughter; it is sufficient if the evidence for the defendant raises a reasonable doubt of his guilt. 87 Cal. 349.

Dying declarations, to be admissible, need not state that they were made under a sense of impending death, if it is otherwise shown that they were so made. 87 Cal. 117.

Where the deceased made a verbal statement, which was substantially reduced to writing and then signed by him, it becomes his dying declaration. 87 Cal. 117.

See EVIDENCE, and subheads thereunder.

XI. INSTRUCTIONS.

An instruction that is misleading is ground for a new trial. 68 Cal. 549.

Instructions on the subject of conspiracy approved. 68 Cal. 113.

The omission to state "that belief should be to a moral certainty" held not error, because not requested. 68 Cal. 434.

Instructions as to the degree of murder held proper. 68 Cal. 101.

Instructions as to self-defense held proper. 70 Cal. 521.

Instructions as to extenuating circumstances, and the penalty of imprisonment for life, held proper. 68 Cal. 190.

Instructions as to what constitutes a deadly weapon held correct. 69 Cal. 601.

A refusal to instruct as to justifiable assault held correct. 69 Cal. 601.

Instructions as to an *alibi* reviewed and approved. 69 Cal. 552.

Instructions as to manslaughter properly refused, because the crime was not manslaughter. 69 Cal. 552.

The maxim, *Falsus in unum, falsus in omnibus*, involves the element of willful falsehood. 69 Cal. 226.

A court may advise a jury to acquit, but the jury are not bound by such advice. 70 Cal. 17.

At a trial, when one of different verdicts is proper, omission to charge the jury as to their power to convict for the lesser crime is not error. 70 Cal. 641.

Instruction in forgery held proper. 70 Cal. 161.

An instruction that a jury might convict, though they might not be entirely satisfied that defendant and no other person committed the offense, is palpably erroneous. 70 Cal. 643.

Instructions must be in writing, or taken down by stenographer. 70 Cal. 643.

Certain instructions as to self-defense held proper. 85 Cal. 231.

Instruction as to the effect where a witness is found to testify willfully false. 71 Cal. 395.

Instructions as to defendant's interest in the suit held proper. 71 Cal. 1. So, also, as to the interest of defendant's relatives, who are witnesses. 71 Cal. 602.

Instructions as to the law of self-defense held misleading. 71 Cal. 569.

Apparent necessity and good faith as an element in the doctrine of self-defense. 71 Cal. 569.

An instruction, "if you believe the defendant guilty, you must so find, notwithstanding his good character," held proper. 72 Cal. 216.

Instructions as to circumstantial evidence held proper. 72 Cal. 582.

Instructions as to the means of proving intent held proper. 72 Cal. 62.

Failure to instruct on a point is not error, if not requested. 72 Cal. 46.

Instructions as to reasonable doubt and the distinction between murder and manslaughter approved. 72 Cal. 609.

Instructions as to reasonable doubt held ambiguous, but not misleading. 72 Cal. 623.

Instruction that an act is "willful," if done with deliberation, and not through

surprise, confusion, or mistake of fact, held proper. 68 Cal. 434.

Instructions which assume a fact undisputed held not erroneous. 72 Cal. 623.

Instructions as to larceny held not prejudicial. 72 Cal. 59.

Instructions in cases of receiving stolen goods held erroneous. 72 Cal. 459.

Failure to instruct on certain points, where no requests were made, held not error. 73 Cal. 511.

Instructions as to the testimony of a witness willfully false held proper. 73 Cal. 511.

Felonious intent as a necessary element in grand larceny. 73 Cal. 378.

Instructions under 3185 of the Political Code held erroneous. 73 Cal. 405.

Instruction which omits reference to a conviction of a lower grade of offense is not erroneous in the absence of evidence tending to show it. 73 Cal. 226.

Instructions as to the right of self-defense approved. 73 Cal. 226.

Instructions as to murder in the first degree held erroneous. 73 Cal. 531.

Instruction as to the unexplained possession of stolen goods as an evidence of guilt held not prejudicial. 85 Cal. 374.

Instructions as to the corroboration of an accomplice held proper. 73 Cal. 348. Any evidence tending to such corroboration held sufficient. Id.

Instructions as to assault and assault with a deadly weapon held proper. 74 Cal. 407; 73 Cal. 226.

Instructions in a case of obtaining false evidence held erroneous. 74 Cal. 306.

Instructions that the recent possession of stolen goods raises a presumption of guilt held error, though modified. 74 Cal. 81.

An instruction that flight is an evidence of guilt is erroneous, if it assumes that which is disputed. 74 Cal. 642.

An instruction as to justifiable homicide is not erroneous because of not going into details. 74 Cal. 642.

An instruction that the "killing was not disputed" is erroneous, where no admission was made or involved in the defense. 74 Cal. 30.

Instructions as to the weight of evidence held proper. 74 Cal. 389.

Instructions as to grand larceny and reasonable doubt held not proper. 85 Cal. 568.

An instruction which assumes guilt may be cured by a subsequent caution. 75 Cal. 306.

An instruction on insanity will not be held erroneous, in the absence of the evidence. 75 Cal. 306.

In a prosecution for an assault to murder, where the evidence shows a shooting, it is not error to refuse to instruct that the defendant might be convicted of a simple assault. 76 Cal. 521.

A court, if requested, must charge the jury

"that the burden is upon the prosecution to establish every element of the crime of which the accused may be convicted, beyond a reasonable doubt." 76 Cal. 386.

Words preliminary to instructions need not be taken down by stenographer. 76 Cal. 281.

Refusal to give instructions already covered by the other instructions is not error. 76 Cal. 521.

Instructions in a case of circumstantial evidence as to "the superior number of probabilities," and as to the "degree of certainty," held improper. 84 Cal. 449.

It is error to instruct the jury that they most acquit, "unless they seriously believe the defendant guilty." 84 Cal. 31.

It is not error to instruct a jury that before they find a verdict of guilty, their opinion "must nearly approach absolute conviction." 84 Cal. 31.

A certain instruction that witnesses who confess to being criminals ought not to stand on the same footing with honest men held to be proper, but on the verge of error. 84 Cal. 31.

Instructions are no part of the record, unless incorporated by the judge, or embodied in a bill of exceptions. 77 Cal. 179.

Evidence offered for a special purpose may be so limited by the instructions. 77 Cal. 618.

Instructions as to false personation. 77 Cal. 436.

Instructions as to conspiracy. 77 Cal. 494.

Instructions as to bribery held improper 78 Cal. 169.

An instruction as to how the intention with which an act was done should be discovered held correct. 78 Cal. 41.

An instruction in a trial on a charge of attempt to commit rape, as to what constituted simple assault, held correct. 80 Cal. 307.

Instructions in a case of an assault with intent to murder held erroneous, because omitting "intent." 80 Cal. 41.

Instruction as to guilty possession of counterfeiting tools held correct. 80 Cal. 285.

An instruction that homicide committed in attempting a felony is murder held proper. 80 Cal. 122.

An instruction that where there is a conspiracy to commit a felony, a murder committed by any conspirator in carrying it out is murder in all, held proper. 80 Cal. 122.

Instructions as to mitigating circumstances and imprisonment for life held proper. 80 Cal. 122.

Instructions as to flight, liable to prejudice the case of the defendant and mislead the jury, held ground for a new trial. 85 Cal. 171.

Instructions as to excusable homicide held proper. 80 Cal. 160.

Instructions as to burden of proof held erroneous. 80 Cal. 296.

An instruction that assumes the guilt of the defendant is error. 81 Cal. 113.

Instructions not authenticated by the judge or in the bill of exceptions will not be considered. 81 Cal. 209.

Instructions as to the felonious intent upon a trial for larceny held proper. 85 Cal. 515.

Instructions already given in substance need not be repeated. 85 Cal. 231.

An ambiguous or ungrammatical instruction held not necessarily misleading. 85 Cal. 424.

The presumption is, that the instructions given correctly and fully charge the jury as to the law of the case. 85 Cal. 542.

In equity cases, the verdict of the jury is merely advisory, and error in the instructions is immaterial. 85 Cal. 205; 85 Cal. 542.

An instruction that the defense of an *alibi* should be subject to a rigid scrutiny, while improper, is not ground for reversal. 85 Cal. 39.

A refusal to instruct the jury that the defendant must be acquitted if he was insane at the time of trial commented on. 85 Cal. 300.

Instructions as to the possession of stolen goods as evidence of the burglary held proper. 85 Cal. 374.

Instructions as to the right of an officer to disarm an arrested person. 85 Cal. 231.

Instruction in a case of homicide, as to the doctrine of self-defense, held proper. 85 Cal. 231.

Failure to give instruction as to the commission of a felony, when material to the case of the defense, held ground for reversal. 85 Cal. 231.

Instructions on an information charging a defendant with participation in a game of tan held erroneous, but not prejudicial. 85 Cal. 590.

Instruction as to reasonable doubt in a trial for larceny held proper. 85 Cal. 568.

A mere statement of admitted facts is not an instruction, but a mere statement of evidence, and is not erroneous. 85 Cal. 568.

An instruction conveying to the minds of the jury that defendant's witnesses were disreputable is clearly erroneous. 85 Cal. 568.

Instructions as to circumstantial evidence and the necessity of "moral certainty" held proper. 85 Cal. 421.

Instructions in relation to the defense of an *alibi* held unnecessary, but not erroneous. 86 Cal. 403; 86 Cal. 225.

An instruction that the burden was on the defendant to prove his defense of insanity by a preponderance of evidence held not prejudicial under the special circumstances. 86 Cal. 295.

An instruction taken *verbatim* from section

1105 of the Penal Code is not erroneous, but should be accompanied by an instruction as to reasonable doubt. 86 Cal. 225. See 86 Cal. 144.

An erroneous instruction as to self-defense cannot be prejudicial, where no such defense to the charge is attempted to be proven. 86 Cal. 225.

A portion of an instruction as to "possible doubt" held meaningless, but not ground for reversal. 86 Cal. 329.

An instruction which refers to the homicide as murder cannot be regarded as an assumption that the crime had been proven, where the defense is an *alibi*. 86 Cal. 329.

Instructions must be construed as a whole. If the entire charge is sufficiently accurate and free from prejudicial error, the judgment will not be reversed for minor defects. 86 Cal. 329.

A jury should not be instructed that they are bound to presume what the prosecuting witness said was true because he was not contradicted. Such a charge violates section 19, article 6, of our constitution. 86 Cal. 31.

An instruction that the testimony of defendants is not entitled to the same consideration as that of a person not charged with a crime held improper, but not ground for reversal. 86 Cal. 31.

If a requested instruction contains several propositions, one of which is erroneous, the court may refuse the whole instruction. 86 Cal. 497.

Larceny in the appropriation of lost property, instructions as to, held proper. 81 Cal. 135.

Instructions as to defendant's good character held not erroneous. 81 Cal. 566.

It is error for the court to convey to the jury the idea that defendant's witnesses were of a disreputable class. 85 Cal. 368.

An instruction which assumes or implies the guilt of the accused is erroneous. 81 Cal. 142.

An instruction defining a reasonable doubt as "such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself" is erroneous. 87 Cal. 117.

XII. VERDICT AND JUDGMENT.

In a prosecution for grand larceny, a verdict of "guilty as charged" is sufficient. 70 Cal. 428.

The requirement of section 1200 of the Penal Code as to sentence held complied with. 70 Cal. 469.

Assault cannot be punished by both fine and imprisonment. 71 Cal. 624.

A sentence may be amended within reasonable time. 71 Cal. 624. See 72 Cal. 10.

A mere clerical error in the judgment will not avoid it. 71 Cal. 384.

The act permitting minors, after convic-

tion, to be delivered to the custody of certain charitable corporations held valid. 71 Cal. 627.

A person guilty of a prior conviction cannot be sentenced to the house of correction. 72 Cal. 10.

Failure of a court to adopt a recommendation to mercy held not ground for reversal. 72 Cal. 117.

Sentence of fifty years for robbery held not excessive. 72 Cal. 59.

In a trial for an assault to commit murder, a verdict of "guilty" is sufficient. 73 Cal. 345.

On conviction of a man who admits a prior conviction for larceny, the sentence should be that of a case of previous conviction. 73 Cal. 438.

Where the evidence is conflicting, the verdict will not be disturbed. 73 Cal. 186.

A prisoner will not be released on *habeas corpus* because the judgment fails to recite the date of the offense, or that it had been feloniously committed. 75 Cal. 226.

Under an information for an assault to commit murder, a party may be convicted of an assault with a deadly weapon. 75 Cal. 407.

When a person is convicted of two crimes, his second imprisonment begins when the first ends, whether specified in the judgment or not. 76 Cal. 514.

A judgment under a city ordinance making it unlawful to visit a place for the practice of gambling is valid. 76 Cal. 587.

A verdict of guilty as charged on an information for murder, without specification of degree, is invalid. 78 Cal. 388.

A commitment on a judgment need not recite the details showing regularity of sentence. 83 Cal. 620.

Imprisonment in the state prison involves hard labor, and where a judgment is for imprisonment in a state prison and also a fine, or in case the fine is not paid, then additional imprisonment, such additional imprisonment can only be had in the county jail. 78 Cal. 306.

A party committed for contempt will be discharged from hard labor on the streets by *habeas corpus*. 80 Cal. 201.

A party violating a town ordinance cannot be imprisoned in the county jail. 81 Cal. 199.

A prisoner will not be discharged on *habeas corpus* because he was denied a jury trial in a justice's court. 82 Cal. 454.

The code provides for imprisonment as a means of enforcing a fine for misdemeanor. 82 Cal. 454.

In felonies, if a fine be imposed in addition to imprisonment, the defendant, at the end of such imprisonment, may be discharged on *habeas corpus*. 82 Cal. 518; 83 Cal. 388. See 78 Cal. 304; 82 Cal. 274.

In recent years the practice of imprison-

ment for fines has resulted in great oppression in imposing on defendants convicted of trivial offenses extreme and cruel terms of imprisonment. (Concurring opinion of McFarland, J.) 82 Cal. 520.

Where a party is sentenced for two crimes, and appeals, his term commences at the date when the sentence is affirmed. 86 Cal. 427.

Section 1205 of the Penal Code does not always apply to a conviction of obtaining money under false pretenses. 82 Cal. 273.

A judgment on conviction of misdemeanor imposing a definite fine and imprisonment until paid held valid. 84 Cal. 165.

A defendant held not liable to imprisonment for non-payment of fine. 84 Cal. 468.

A judgment imposing a fine and term of imprisonment, and providing also for the further enforcement of the fine by further imprisonment, is void as to the latter portion only. 85 Cal. 600.

The act providing for the sentencing of certain prisoners to the house of correction is not unconstitutional. 87 Cal. 78.

The superior court of the city and county of San Francisco is successor to the municipal criminal court, and may sentence to the house of correction persons convicted of felony. 87 Cal. 78.

When the record is silent as to the age of a prisoner, it will be presumed that he was of such age as is consistent with the sentence he received. The point cannot be inquired into on *habeas corpus*. 87 Cal. 78.

A verdict finding the defendant guilty of an "assault with a deadly weapon," without naming the person on whom the assault was committed, held sufficient. 87 Cal. 281.

Where a party has been convicted of an assault with a deadly weapon, and there has been a prior conviction of manslaughter, he may be punished by imprisonment for any term not exceeding ten years. 87 Cal. 281.

In an information for grand larceny, a verdict of guilty as charged is sufficient. 87 Cal. 122.

Where the judgment on a verdict of grand larceny is, that the defendant be punished for the crime of which he was charged and convicted by imprisonment in the state prison of the state of California at San Quentin for the term of nine years, it is sufficient under the statute. 87 Cal. 122.

XIII. NEW TRIALS AND APPEALS.

The failure of the court to instruct the jury that a verdict of murder in the first degree, without fixing a penalty, meant "death," is not cause for a reversal. 69 Cal. 169.

A verdict, once rendered in favor of a defendant, is final, so far as any attempt of the prosecution to set it aside. 70 Cal. 17.

A provision for the rehearing of a criminal cause must not violate the constitution. 70 Cal. 17.

The punishment for assault with a deadly weapon is not "cruel or unusual." 70 Cal. 1.

An order dismissing a criminal action is not appealable. 71 Cal. 546.

A point not mentioned in the bill of exceptions will not be considered. 72 Cal. 46.

The reason why a bill of exception was settled after the statutory period will be presumed sufficient. 73 Cal. 378.

The reporter's notes cannot properly constitute a bill of exceptions which the court should settle. 73 Cal. 537.

Presentation for settlement held not in time. 73 Cal. 537.

Notice of application to prove exceptions must be given to the judge and district attorney. 73 Cal. 1.

An order granting a new trial for insufficiency of evidence is within the discretion of the trial court. 73 Cal. 241.

Application to supreme court to settle a bill of exceptions must specify the facts and show their materiality. 74 Cal. 188.

Showing necessary to be made on a motion for a new trial because of newly discovered evidence discussed. 74 Cal. 547; 74 Cal. 389. Further held, that applications on this ground should be regarded with distrust and disfavor. 74 Cal. 547.

Judgment will not be reversed for an error which did not prejudice a defendant's case. 75 Cal. 412.

Application to supreme court to compel a settlement of bill of exceptions must give notice as required by law. 76 Cal. 513.

An exhibition of weapons, etc., which are brought into court and laid on the table before the jury, is not ground for reversal, if an objection thereto is not taken at the time. 76 Cal. 281.

An appeal for refusal to allow evidence on a challenge for actual bias must be based on a bill of exceptions. 76 Cal. 328.

A failure of the court to comply with section 1066 of the Penal Code is not ground for a new trial. 76 Cal. 328.

Affidavits of jurors are admissible to deny alleged misconduct. 76 Cal. 328.

Certain newly discovered evidence held not ground for a new trial. 76 Cal. 328.

The hostility of a judge is not ground for a new trial. 76 Cal. 328.

A defendant indicted for murder, and convicted of manslaughter, who secures a new trial, cannot plead "once in jeopardy" as to either offense. 77 Cal. 213.

An appeal will be dismissed when the judgment is not in the record. 77 Cal. 308.

An appeal from an order refusing a new trial must show the grounds on which the motion was made. 77 Cal. 308.

The instructions of the court must appear in the record by the indorsement of the judge or in a bill of exceptions. 77 Cal. 179.

Remarks of the judge held not ground for reversal in a particular case. 77 Cal. 618.

Omission to give an instruction not requested held not error. 77 Cal. 618.

Newly discovered evidence, when ground for a new trial. 77 Cal. 636; 76 Cal. 328.

The fact that an information called the crime by the wrong name is not cause for reversal. 77 Cal. 147.

A refusal to grant a new trial because of newly discovered evidence is not error, where no reason is shown why the evidence was not produced at the trial. 85 Cal. 421.

An order denying a motion in arrest of judgment is not appealable. 77 Cal. 445.

A new trial will not be granted for insufficiency of the evidence, when there is evidence of the defendant's guilt. 77 Cal. 560.

Affidavits used on a motion for a new trial must be certified by the judge, or be in the bill of exceptions. 77 Cal. 529.

Evidence incompetent, but clearly not prejudicial, is not ground for reversal. 85 Cal. 421.

The act requiring doctors to procure certificates from a board of examiners held not unconstitutional as a whole. 77 Cal. 164.

But in such case the power is limited, and cannot forbid a doctor advertising himself as a specialist. 77 Cal. 164.

The objection that a confession was not shown to be voluntary cannot be first taken on appeal. 77 Cal. 618.

A disallowance of a challenge for cause will not be reviewed on appeal. 77 Cal. 113.

The drinking of intoxicating liquors by a jury deliberating in a capital case, even though served with a meal, is ground for a new trial, regardless of quantity or effect. 78 Cal. 317.

Proper practice relating to certificate of probable cause for appeal. 81 Cal. 163.

"Probable cause," in section 1243 of the Penal Code, means only a really debatable case. 81 Cal. 163.

Unless the record states that it contains all the evidence, the point as to insufficiency of evidence cannot be considered. 81 Cal. 275.

Objections to the admission of evidence cannot be taken for the first time on appeal. 81 Cal. 210.

The fact that his attorney and not himself entered a plea of "not guilty" cannot prejudice a defendant. 81 Cal. 566.

Request for modification of instructions, how authenticated. 84 Cal. 573.

A motion in arrest of judgment must be based on defects on the face of the information. 82 Cal. 620.

An order denying a new trial will not be reversed even where there was a preponderance of evidence in favor of the defendant. 86 Cal. 329.

A ruling on the challenge of a juror for actual bias will not be reviewed on appeal. 87 Cal. 117.

An instruction cannot be reviewed in the

absence of the indorsement showing whether it was given or not. 87 Cal. 117.

See CERTIFICATE; CONTEMPT; EVIDENCE; GRAND JURY; HABEAS CORPUS; INFORMATION; JUSTICE'S COURT; MANDAMUS; POLICE COURT; WITNESSES.

CROSS-COMPLAINT.

See COUNTERCLAIM; PLEADING.

CROSS-EXAMINATION.

See EVIDENCE.

CRUELTY.

See DIVORCE.

CUSTOM.

A general custom is regarded as an element in contracts. 68 Cal. 522.

In the absence of a custom requiring it, a notice of mining location need not be recorded. 72 Cal. 528.

The custom of a merchant is presumed to be known to his customers and implied in their contracts, and this rule applies to charging interests on accounts. 74 Cal. 71.

In an action to recover an insurance policy payable in accordance with the "custom," the custom must be proved as a fact. 76 Cal. 145.

See CONTRACTS.

DAMAGES FOR BREACH OF CONTRACTS.

See CONTRACTS.

DAMAGES FOR WRONGS.

Allegation for damages not essential to a suit for an injunction. 68 Cal. 146; 69 Cal. 255.

Verdict of damages for malicious prosecution held excessive. 68 Cal. 381.

Instructions in suit to recover damages for the malicious prosecution of a civil action. 63 Cal. 151.

Damages, how estimated for land taken for road purposes. 68 Cal. 57.

Damages, how mitigated by evidence in an action for slander. 68 Cal. 109.

Damages caused to a house by blasting car-

ried on in its neighborhood. 69 Cal. 155; 84 Cal. 515. In such cases, neither care nor skill is any defense to a use of property so unreasonable, unusual, and unnatural. *Id.*

Finding as to damages is unnecessary when the judgment is for the defendant. 69 Cal. 454.

A verdict for nominal damages will sustain a judgment for one cent damages. 70 Cal. 518.

Damages for malicious prosecution, without imprisonment, in the sum of four thousand dollars, held excessive to the extent of three thousand dollars. 70 Cal. 201.

Damages for several distinct injuries must specify the amount claimed for each. 70 Cal. 161.

Damages for obstructing a public highway should be brought in the name of the name of the road overseer. 71 Cal. 34.

Damages for less than three hundred dollars against an assessor cannot be brought in the superior court. 71 Cal. 87.

Damages to a tenant caused by the wrongful act of the landlord. 71 Cal. 159.

Damages for obstructing a public street must show some special injury to plaintiff. 71 Cal. 83.

Damages for unlawful detainer held not excessive. 71 Cal. 46.

Damage for the destruction of fruit trees is measured by their value as grown. 72 Cal. 75.

Interest on unliquidated damages cannot be recovered until ascertained. 72 Cal. 498.

Actual damages for a nuisance may be awarded, although the injury consists in mere discomfort. 72 Cal. 248.

Damages for conversion, how estimated. 73 Cal. 154; 73 Cal. 618.

Damages against the state are governed by the same rule that applies to individuals. Remote or consequential damages are not recoverable. 73 Cal. 29.

Exemplary damages are not confined to cases in which malice is shown. 74 Cal. 148.

Damages in cases of condemnation of land, how estimated. 74 Cal. 261.

Special damages are prerequisite to a suit to abate a public nuisance. 74 Cal. 463.

A party entitled to only nominal damages cannot have a judgment reversed because it was in favor of the defendant. 75 Cal. 182.

Damages for malicious trespass, instructions as to, held proper. 75 Cal. 563.

Damages are not essential as prerequisite to an injunction. 75 Cal. 428.

Damages for the death of a minor child, how estimated. 76 Cal. 240.

A judgment for damages in excess of the amount prayed for is erroneous. 75 Cal. 356.

Damages for malicious assault may be exemplary. 76 Cal. 532.

In a suit for damages against a notary

public for a defective acknowledgment, the fact that the property was worthless is a complete defense. 75 Cal. 132.

In damages for fraud, the anxiety and worry caused cannot be considered. 77 Cal. 22.

Any party who contributes to a wrong is liable for damages, even though his share cannot be accurately measured. 78 Cal. 451.

A complaint for damages need not aver the amount sustained, if it prays for judgment in a special amount. 78 Cal. 490.

In an injunction suit, damages because of such injunction cannot be set up by counterclaim. 78 Cal. 95.

In a suit for damages for personal injuries, the fact that the doctor's bill has not been actually paid is immaterial. 79 Cal. 74.

In a suit for damages for conversion, the original cost of the article is relevant. 79 Cal. 181.

In an action on a bond given to release attached property, the measure of damages is the value of the property, not exceeding the amount of the judgment, with legal interest. 79 Cal. 556.

In a suit for false representation, the measure of damages is the actual loss. 79 Cal. 234.

It is doubtful if damages recoverable on an injunction bond include counsel fees for an unsuccessful attempt to dissolve the injunction. In any case, such services must be specifically rendered for the purpose, and paid for. 79 Cal. 301.

An action for damages lies by the mortgagee for the removal of fixtures covered by the mortgage. 80 Cal. 245.

On a preliminary injunction bond, the profits lost by the suspension of the business may be recovered; also, counsel fees. 80 Cal. 611.

Damages resulting from an injunction after final decree are not recoverable on the bond. 80 Cal. 623.

In a suit for personal injury, all damages, the necessary result of the injury, are recoverable without being specially pleaded. 80 Cal. 574.

In a suit for personal injuries, mere carelessness, however gross, will not warrant exemplary damages. 80 Cal. 135.

Damages for failure of mining directors to post notices required by the "Felton law." 81 Cal. 231.

Damages for fraud are waived by acquiescence. 81 Cal. 1.

A complaint for damages for an aggravated trespass detailing the circumstances held not demurrable. 81 Cal. 289.

Insults accompanying a forcible trespass held relevant in estimating damages. 81 Cal. 289. In such case, a verdict of five hundred dollars held not excessive. Id.

In an appeal taken for delay, the judgment

will be affirmed, with damages. 82 Cal. 635.

A person is only liable for such damage as is directly and proximately caused by his negligence. 82 Cal. 595.

A complaint for fraud and damages held insufficient. 82 Cal. 193.

An action for damages will lie against a municipal corporation for damages caused by a defective sewer. 84 Cal. 304.

Damages for death may be brought by the representative of the deceased. 84 Cal. 515.

A judgment for damages caused to an abutting lot by a street-railroad is a bar to an action by the same party against the same defendant for damages caused by the same act to another lot in the same immediate neighborhood. 86 Cal. 415.

A single tort gives but a separate cause of action to plaintiff, even though such tort injured several pieces of his property. 86 Cal. 415.

Damages recovered for the death of a person are no part of the estate. 84 Cal. 515. Nor can the sorrow or grief of the widow be considered. 84 Cal. 515.

Damages in the sum of three thousand dollars to a widow for the loss of her son held not excessive. 84 Cal. 515.

Special damages need not be alleged in slander, where the words themselves are actionable. 84 Cal. 177.

Under section 3294 of the Civil Code, exemplary damages are not confined to malicious cases. 74 Cal. 148.

Exemplary damages may be proper in an action for assault and battery. 76 Cal. 148.

A wanton and malicious trespass is sufficient cause for exemplary damages. 81 Cal. 289.

An action for damages, joined in a complaint to abate a nuisance causing such damages, is not demurrable for misjoinder of causes of action. 70 Cal. 161.

Damages may be claimed and received for both the taking and the detention of personal property. 87 Cal. 345.

The measure of damages for fraudulent representation of the vendor in regard to land is the difference between its value as represented and its actual value. 87 Cal. 557.

Several tort-feasors not acting in concert or by unity of design are not liable to a joint action for damages, although the consequences of the several torts have united to produce the injury. 87 Cal. 430.

In an action for damages for malicious prosecution, injury to the plaintiff's feelings, caused by the arrest, may be proved under the general allegation of damages. 87 Cal. 629.

The right to recover damages for a personal injury as well as the money so recovered, if acquired by the wife during marriage, is community property, which the husband has the right to control. 87 Cal. 464.

A mere denial of conclusions of law is bad. 78 Cal. 95.

See COMMON CARRIER; CONVERSION; NEGLIGENCE; NUISANCE; TRESPASS. For damages for breach of contracts, see CONTRACTS.

DEADLY WEAPONS.

See CRIMINAL LAW.

DEBTOR AND CREDITOR.

A person cannot pay the debt of another without authority, and charge him for the same. 68 Cal. 91.

Letters held to constitute a contract in writing. 68 Cal. 466.

A creditor to whom several debts are due may apply a payment to any of them, where there are no instructions to the contrary. 69 Cal. 120.

The release of one co-obligor not a guarantor does not release his co-obligors. 76 Cal. 6.

An obligation extinguished by payment cannot be subsequently revived or transferred. 76 Cal. 463.

Chattels bought with borrowed money belong to the borrower, and pass by a deed of all his property. 78 Cal. 371.

When a payment is made to a creditor who holds several claims, and neither party applies it to any particular debt, the law applies it to the oldest claim. 81 Cal. 56.

A debtor in failing circumstances has a right to give a preference to one creditor over another, providing the debt and transfer be *bona fide*. 82 Cal. 132.

A written order verbally accepted is admissible in evidence in an action by the payee to recover the amount thereof. 87 Cal. 424.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; ATTACHMENT; EXECUTION; FRAUD; HOMESTEAD; INSOLVENCY; MARRIED WOMEN; STATUTES OF LIMITATION.

DECISION.

See APPEAL.

DECREE.

See EQUITY; FORECLOSURE; JUDGMENT.

DEDICATION.

A judgment held not to bar a claim of dedication to public use. 68 Cal. 439.

In a suit for a right of way of necessity, the plaintiff need not show a dedication. 69 Cal. 199.

The holder of a certificate of purchase of school-land may dedicate a portion for a public road. 71 Cal. 21.

A person who lays out a town site by a map, with streets, and sells the lots therein, dedicates such streets to the public. 72 Cal. 170.

The right to a street or public square cannot be acquired by adverse possession. 72 Cal. 170.

Evidence of the abandonment of a public street by city council held insufficient to divest the public of their right. 83 Cal. 624.

In an action to recover La Fayette Park, on the ground of its dedication to the public, held that the action was defeated by a previous judgment. 76 Cal. 18.

A toll-road is a dedication to the public use, and when the franchise expires the road may be declared a public highway, without compensation. 83 D. 239.

Proof of dedication of a highway by user must show that it continued for five years with the knowledge and consent of the owner, or without his objection. 78 Cal. 9.

To constitute a dedication of land for a street, there must a manifestation of the owner's intent and an acceptance and use by the public. 79 Cal. 449; 81 Cal. 70; 81 Cal. 524.

Evidence held insufficient to show dedication. 81 Cal. 524; 82 Cal. 24; 70 Cal. 476; 70 Cal. 454.

The existence of gates on a road is strong evidence in favor of non-dedication. 82 Cal. 153; 70 Cal. 454.

The sale of a lot as bounded by a certain street is an offer to dedicate such street, and, on acceptance, constitutes a dedication of such street. 83 Cal. 623.

Dedication of a public avenue held clearly proven by the acts of the owners. 84 Cal. 634.

Acceptance of a public street by the supervisors may be shown by official maps. 84 Cal. 634.

When the court finds that the land used for has been dedicated for the use of the public, a further finding, which is immaterial, may be excluded from consideration, even though not supported by the evidence. 87 Cal. 84.

A map made and recorded by a former owner of the premises is admissible against his grantees upon the question of dedication by such former owner. 87 Cal. 84.

Evidence showing a dedication for a public landing will support a finding of a dedication as a public levee and for street purposes. 87 Cal. 84.

When a party holding an inchoate title dedicates land to the public, and subsequently acquires a superior title, he is estopped from claiming in hostility to the dedication. 87 Cal. 84.

To show a dedication of land by the owner

as a public plaza, without any conveyance, the intent of the owner must be proven by express declarations, admissions, or acts establishing his purpose. The mere non-assertion of a right does not establish a dedication. 87 Cal. 514.

The dedication of a street to public use authorizes the use of the street for the tracks of a street-railway without compensation to the owner. 87 Cal. 597.

DEED.

Payment of consideration need not be proven before the admission of a deed in evidence. 69 Cal. 611.

A conveyance to a married woman for her "separate estate" is not conclusive that the property is separate. 71 Cal. 419.

A deed delivered to a third person, to be delivered by him to the grantee when a condition is performed, is a deed in escrow. 72 Cal. 133.

Such deed is not revocable; and on the performance of the condition, becomes absolute without further delivery. 72 Cal. 133; 73 Cal. 176; 77 Cal. 279.

Ambiguity in a deed held not patent; and if latent, parol evidence is admissible. 72 Cal. 86.

A deed for a right of way for a ditch construed. 73 Cal. 249. See 82 Cal. 497.

Parol evidence to identify land described in a sheriff's deed held not admissible. 73 Cal. 43.

Objections to the record of a deed, on the ground of want of proper acknowledgment, must be taken when offered in evidence. 74 Cal. 425.

A proviso in a deed that the land, if ever resold, should be to the grantor, is a personal contract, not binding on the land. 74 Cal. 141.

Pre-existing indebtedness held sufficient consideration. 74 Cal. 444.

Possession of a deed by grantee is evidence of its delivery. Under section 1055 of the Civil Code a deed duly executed is presumed to have been delivered at its date, and identity of person is presumed from identity of name. 75 Cal. 240. See also 78 Cal. 273.

A deed cannot be avoided by evidence of a parol agreement to hold it in trust. 76 Cal. 469.

A mere clerical error as to a section quarter will not vitiate a deed, if the land can be identified by monuments. 76 Cal. 476.

The statement in a deed as to quantity of land is not conclusive. 76 Cal. 169.

Land conveyed to a woman before marriage is her separate property. 76 Cal. 401.

In an action to set aside a deed for undue influence, etc., objections to the complaint held waived. 76 Cal. 631.

An error in a deed, caused by mistake, will be corrected by a court of equity. 77 Cal. 605; 77 Cal. 467.

When a deed refers to an official map, evidence is admissible to show that the map was inaccurate. In a conflict between a map and a survey, the survey controls. 77 Cal. 73; 80 Cal. 78.

The civil law, which applied to all grants made in California prior to 1850, did not require any formal re-entry for forfeiture, to revert title in a pueblo to lands granted upon a condition subsequent. 84 Cal. 143.

A corporate seal is only *prima facie* evidence of authority. 84 Cal. 560.

An unrecorded deed is good as against a subsequent attachment. 77 Cal. 218.

Where the grantee of a deed runs off with it before intentional delivery, there is no delivery. 78 Cal. 424.

Actual notice of an unrecorded deed held sufficiently proven. 78 Cal. 273.

A deed reserving the right of way for a railroad construed. 78 Cal. 258.

Courts take judicial knowledge of words; but a word may be so ambiguously used as to require an investigation as to the circumstances surrounding the use of it. 78 Cal. 258.

A certain deed describing lots by numbers held not ambiguous. 79 Cal. 449.

Courses and distances are controlled by visible monuments. 79 Cal. 443; but such monuments must be fixed and certain. 79 Cal. 540.

To constitute delivery of a deed, there must be an acceptance of it by the grantee. 79 Cal. 403.

A quitclaim deed conveys the fee-simple title, if the grantor has such title. 79 Cal. 449.

A deed from a mining corporation, not ratified by two thirds of its stockholders, conveys no title. 80 Cal. 310.

Proof of such ratification must be made before the deed is admissible as evidence. 81 Cal. 363.

A "deed, grant, and quitclaim" operates as a deed grant, even though "quitclaim" was interpolated. 81 Cal. 358.

In a deed for a right of way, parol evidence is admissible to show the location of the survey, and extrinsic evidence is admissible to explain the calls of the deed. 82 Cal. 497.

The terms "waived" and "renounce" cannot import a conveyance. 82 Cal. 135.

A breach of covenant, at common law, will not revert a title to public or private lands, granted on condition, without a re-entry for the forfeiture. 84 Cal. 143.

A deed to all lands of the grantor in a certain block is not void for uncertainty. 83 Cal. 56.

It must be in all cases presumed that the grantor intended to make a valid grant of

some property, unless the contrary appears. 83 Cal. 56.

Where a grant is *in present*, the violation of a condition subsequent does not of itself effect a reverter of title without process. 83 Cal. 56.

An estate upon *condition* cannot be held created except when the terms of the grant will admit of no other reasonable interpretation. 83 Cal. 56.

All persons are bound to know that property conveyed to a married woman may be her separate property, either because purchased with her separate funds, or as a gift from her husband. 83 Cal. 521.

Reformation of a deed because of mutual mistake at time of execution. 83 Cal. 155.

A conveyance to a person under a fictitious name passes the title. 84 Cal. 239.

Suretyship held to be a valuable consideration for a conveyance. 82 Cal. 278.

The delivery of an absolute deed vests the title. Parol evidence is inadmissible to show that such delivery was conditional. A deed cannot be delivered in escrow to the grantee. 86 Cal. 471.

See AGENCY; BOUNDARIES; EASEMENTS; EVIDENCE; FRAUDULENT CONVEYANCE; MORTGAGE; TAX DEED; TRUST; WATER AND WATER RIGHTS.

DEED OF TRUST.

A deed of trust given as security conveys the legal title. 71 Cal. 470.

A tax deed which appears upon its face to have been altered in a material respect after the execution is not admissible in evidence to show title. 80 Cal. 257.

Provisions of a deed of trust construed. 71 Cal. 588.

Parol evidence is admissible to show the true consideration and intention of a trust deed. 80 Cal. 426.

A verbal agreement to reconvey property deeded to defraud creditors cannot be enforced. 80 Cal. 514.

The statute of limitation does not begin to run in favor of a person holding property by a trust deed, until he repudiates such trust and claims adversely. 80 Cal. 378.

In a contract to convey, and that a deed should be placed in escrow, a suit for specific performance which does not allege a refusal to place the deed in escrow does not state a cause of action. 85 Cal. 58.

A deed to land obtained for the purposes of joint benefit held to constitute a trust as against the grantee named therein. 81 Cal. 328.

One who purchases land at the request of another, and takes the deed in his own name as security for part of the purchase price advanced, holds as trustee. 82 Cal. 202.

See AGENCY; EQUIT; MORTGAGE; TRUST.

DEFAULT.

A default taken against defendants, who are Indians very ignorant and helpless, should be vacated on motion. 68 Cal. 479.

Granting or refusing to set aside a default is generally discretionary with the trial court. 68 Cal. 275; 69 Cal. 635; 77 Cal. 150.

A default may be set aside if caused by the excusable mistake of the attorney as to time of trial. 68 Cal. 275.

Where there is doubt as to granting or refusing of a motion to set aside a default, the motion should be granted. 68 Cal. 276; 69 Cal. 635.

A default entered contrary to a stipulation in writing, which was not filed, should be set aside; and in refusing to do so, the court abused its discretion. 71 Cal. 465.

In an action as against individuals sued as partners, but only one of whom has been served with process, a judgment by default against both is erroneous. 69 Cal. 456; 75 Cal. 590.

Where the case is regularly set for trial, the mistake of the attorney as to the date of trial is not conclusive as to the right to have the judgment set aside. 83 Cal. 452.

In a judgment by default in a justice's court, followed by an execution sale, the return of the constable may be made at any time, to show due service of process. 73 Cal. 562.

Where covenants are mutual and dependent, one party cannot put the other in default without performing his own part. 72 Cal. 217.

An injunction will not lie to restrain an execution based on a judgment void on its face in a justice's court. The remedy is by a motion to vacate the judgment, or arrest the execution. 73 Cal. 5; 75 Cal. 230.

An option that in default of the payment of interest the debt itself may be considered due must be exercised promptly, or it is waived. 73 Cal. 213.

A justice's court may vacate a judgment by default, but none other. 74 Cal. 341.

To sustain a judgment by default when service of summons was attempted by publication, all the steps toward obtaining jurisdiction must appear. 74 Cal. 493; 75 Cal. 376. *Per contra*, 75 Cal. 220.

A judgment by default different from that prayed for in the complaint is erroneous. 78 Cal. 34.

A judgment of divorce by default may be set aside without an affidavit of merits. 77 Cal. 507; 81 Cal. 182.

When a demurrer to a complaint is overruled, no default can be taken until notice thereof has been served and the time given has expired. 77 Cal. 150.

If such notice was given or waived, that fact, if relied on upon appeal, must appear in the record. 77 Cal. 150.

An application to set aside a judgment by default which showed inexcusable neglect and lack of diligence held properly refused. 86 Cal. 60.

An order setting aside a default is generally discretionary with the trial court. 86 Cal. 395. But see 87 Cal. 211.

A judgment void on its face may be vacated on motion at any time. 86 Cal. 395.

A motion to set aside a default may be granted conditionally, and to the extent of a partial defense. 82 Cal. 611.

If two defendants answer, and the third makes default, the verdict should be confined to those two. 82 Cal. 184.

Facts set up to show excusable neglect as a ground for setting aside a default held not sufficient. 82 Cal. 611.

A motion to set aside a judgment for mistake and excusable neglect should be denied, when the plaintiff's counsel voluntarily absented himself from the trial, and had promised to dismiss the case. In such case a motion to set aside the order should be granted. 87 Cal. 211.

The action of the court in setting aside a judgment for inadvertence and mistake will not be disturbed, unless it appears that the court abused its discretion, even though the showing may be a weak one. 87 Cal. 523.

An order setting aside a judgment will not be disturbed, when the judgment was set aside through an inadvertence and mistake of fact of the defendant's attorney in relation to the title of the property involved. 87 Cal. 523.

See AFFIDAVITS OF MERITS; CONTINUANCE; COSTS; JUDGMENT; PLEADINGS; PRACTICE; VERDICT; WITNESSES.

DELAY.

Insufficient excuse for delay in specific performances. 68 Cal. 414; 69 Cal. 207.

Insufficient excuse for delay in seeking equitable relief. 73 Cal. 235.

Sufficient excuse for delay in seeking equitable relief. 69 Cal. 255.

The statute of limitation governs both legal and equitable proceedings. 69 Cal. 255.

Insufficient excuse for delay in seeking rescission of contract. 70 Cal. 250; 71 Cal. 513; 82 Cal. 351.

Delay as a waiver of an option. 73 Cal. 213.

The superior court loses jurisdiction to punish for contempt by unreasonable delay. 76 Cal. 543.

See CRIMINAL LAW; FRAUD; SPECIFIC PERFORMANCE; STATUTE OF LIMITATION; WAIVER.

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DELIVERY.

See AGENCY; CLAIM AND DELIVERY; DEED; NEGOTIABLE INSTRUMENTS; SALE; STATUTE OF FRAUDS.

DEMAND.

The statute of limitation does not run in favor of a public officer until a demand is made. 69 Cal. 531.

A demand must ordinarily be made on the officers of a corporation to bring a suit, before stockholders can do so. 70 Cal. 222.

No demand is necessary in replevin where the property is wrongfully severed from the freehold. 70 Cal. 3.

No demand is necessary by the heirs on a tenant at will as prerequisite to a suit in ejectment, where the landlord dies. 70 Cal. 445.

Where an agent is guilty of fraud as to personal property, a demand for its return is not necessary before suit. 73 Cal. 53.

In an action on a penalty for failure to pay "on demand," a demand for the precise amount must be proven. 73 Cal. 262. See also 73 Cal. 68.

An indorser on a note "payable on demand with interest" is not exonerated by the failure of the payee to present the note for payment. 74 Cal. 362. See 82 Cal. 32.

The assignee in insolvency need make no demand before suit for property transferred in violation of the statute. 75 Cal. 185.

It is doubtful if *mandamus* proceedings require, in all cases, that a demand should be first made. 76 Cal. 269.

A surety on the face of a note is not entitled to a demand upon the principal, or notice of non-payment, to fix his liability. 77 Cal. 476. This rule applies to all cases of sureties and guarantors on bonds and undertakings. 78 Cal. 443.

No demand is necessary as prerequisite to a suit on a promissory note payable on demand. Sections 3131 and 3135 of the Civil Code apply only to indorsers. 82 Cal. 32.

See CONVERSION; NEGOTIABLE INSTRUMENTS.

DEMURRER.

See PLEADINGS.

DEPOSITIONS.

See EVIDENCE.

DEPOSITS.

See NEGOTIABLE INSTRUMENT.

DESCRIPTION.

See BOUNDARIES; DEED; MORTGAGE; SALE.

DESERTION.

See DIVORCE.

DETAINEE.

See FORCIBLE ENTRY AND DETAINEE.

DEVISEE.

See PROBATE LAW.

DILIGENCE.

See CONTINUANCE; DEFAULT; EQUITY.

DIRECTORS.

See CORPORATION.

DISBARMENT.

See ATTORNEY.

DISCLAIMER.

See EJECTMENT; QUIETING TITLE.

DISCOVERY.

See FRAUD.

DISCRETION.

See APPEAL; CONTINUANCE; DEFAULT; PRACTICE.

DISMISSAL.

An action cannot be dismissed because a complaint, although filed, was not indorsed as filed. 68 Cal. 98.

Illness of the judge is sufficient excuse for a failure to try a criminal case within sixty days after filing the information. 69 Cal. 540.

An action will not be dismissed because of another action pending, if the former action has been dismissed. 69 Cal. 637.

An action will not be dismissed for want

of prosecution, where the delay was had at the request of the defendant. 69 Cal. 525.

An action may be dismissed for want of diligence in prosecuting before a referee. 70 Cal. 87.

An action will not be dismissed for want of prosecution, where the delay was had at the request of the defendant. 69 Cal. 525.

An action will not be dismissed because the defendant was carelessly sued under a fictitious name. 70 Cal. 23.

A proceeding to disbar an attorney cannot be dismissed by the accuser. 71 Cal. 584.

A judgment of dismissal for want of prosecution may be set aside. 71 Cal. 94.

An appeal to the superior court arbitrarily dismissed will be reinstated on certiorari. 71 Cal. 550.

Where a complaint is stricken out by consent, the action is properly dismissed. 71 Cal. 72.

An action directed to be dismissed by the plaintiff is not dismissed until the judgment of dismissal is entered in the judgment-book, as well as in the register of actions. 76 Cal. 372; 77 Cal. 83.

See APPEALS; NONSUIT; PRACTICE.

DISTRIBUTION.

See PROBATE LAW.

DISTRICT ATTORNEY.

See CRIMINAL LAW; PUBLIC OFFICERS.

DITCH.

See EASEMENT; PUBLIC LAND; WATER RIGHTS.

DIVORCE.

Even though a divorce is denied, the court may require the husband to provide for the wife living separate from him. 68 Cal. 588. *Per contra*, 74 Cal. 608.

A notice of appeal from a decree of divorce may be embraced in a notice of several appeals relating to the same suit. 68 Cal. 328.

In a suit for divorce, if a disposition of property is sought, there must be some appropriate pleading; without this, there can be no restraining order. 69 Cal. 633.

In an appeal from an order in a divorce suit, the papers must be identified in the usual manner. 70 Cal. 72.

A decree of divorce dividing the property

in accordance with stipulation may be refused to conform to the intent of the parties. 70 Cal. 619.

The superior court, when the wife appeals, may compel the husband to provide her money for costs and counsel fees to prosecute such appeal. 71 Cal. 330.

A husband who in open court refuses to pay alimony may be summarily punished for contempt. 71 Cal. 608.

Marriage, once proven, is presumed to continue until death or divorce is shown. 71 Cal. 263.

A decree of divorce may reserve for future action all questions as to property and allowance. 72 Cal. 398; 77 Cal. 102.

A finding as to desertion held supported by the evidence. 73 Cal. 630.

A doctor must, in a divorce suit, answer as to a fact which did not concern a privileged matter. 73 Cal. 106.

Allowance of costs, alimony, and counsel fees *pendente lite* are discretionary. 73 Cal. 105. But see 80 Cal. 141.

A husband committed for contempt for not paying alimony will not be discharged on *habeas corpus* on the ground that he has been declared insolvent. 73 Cal. 97.

A supplementary complaint setting up a new cause of action dates only from the time it is filed. 73 Cal. 106.

The question as to whether slander inflicted extreme mental cruelty is for the court to decide. 73 Cal. 106.

As to the disposition of the homestead in divorce, see 73 Cal. 428; 78 Cal. 310.

A deed from the husband to the wife, of the homestead, after divorce makes her the sole owner thereof. 73 Cal. 271.

There is no such thing as a divorce "*a mensa et thoro*" under the laws of California; nor can a husband be compelled to support his undivorced wife while she is willfully living separate from him, and not entitled to a divorce. 74 Cal. 608.

In a suit for divorce, an order that the husband pay his invalid wife \$125 per month out of his income of \$432 held not excessive. 74 Cal. 36.

A separate order requiring the payment of \$150 is not appealable, because the amount is too small to give the court jurisdiction. 83 Cal. 618.

While an action for divorce is pending, a counter-action for cruelty based on the alleged false allegations of the first complaint cannot be maintained. 74 Cal. 489.

Where the husband's income is over four hundred dollars per month, an allowance to the wife of a thousand dollars for counsel fees is not excessive. 74 Cal. 36.

Counsel fees must be made payable to the wife, and not to the attorney. 75 Cal. 1.

In a certain case, the sum of fifty-five thousand dollars as counsel fees held excessive. 75 Cal. 1.

In a decree of divorce, the court has no power to decide as to the possession or property rights of third parties. 75 Cal. 434.

In a decree of divorce, a sale of property under the decree need not be confirmed unless the order so provides. 75 Cal. 413.

A judgment of divorce, signed by the judge, and filed by the clerk, is binding, although not entered. 75 Cal. 213; 77 Cal. 226.

An action for divorce is a proceeding *in rem*, and service of summons may be made by publication. 75 Cal. 213.

No affidavit of merit is necessary for a motion to set aside a decree of divorce by default. 77 Cal. 507.

A judgment of divorce becomes valid when pronounced by the court. It need not be in writing or signed by the judge. 77 Cal. 226.

When a divorce is denied, permanent alimony cannot be granted to the wife, who is not living separate from her husband. 79 Cal. 336.

An allowance of temporary alimony may be based upon the earnings of the husband, or his ability to earn. 79 Cal. 336.

An order for alimony and counsel fees may adjudge that the same be a lien on certain described real property of the defendant. 79 Cal. 511.

An allowance of alimony, etc., may be in a sum gross, instead of a monthly allowance. 79 Cal. 511.

An execution may be issued for alimony without notice. 79 Cal. 600.

A defendant in a divorce suit adjudged guilty of contempt for refusing to pay alimony may be discharged under section 1149 of the Code of Civil Procedure. 75 Cal. 580; 79 Cal. 215.

A wife, misled by her husband as to his property, cannot obtain relief after divorce, where she has been negligent in investigation. 79 Cal. 17.

A judgment decreeing a divorce, and providing for a division of the community property, is a final judgment, although it leaves certain matters to be afterwards ascertained by the referee. 79 Cal. 633.

A complaint for a divorce on the ground of habitual intemperance is sufficient if substantially in the language of section 106 of the Civil Code. Specific acts need not be alleged. 80 Cal. 528.

Where the homestead is awarded to the wife, to be held in "trust for her and the children," the provision as to the trust is void, and she takes such property absolutely. 80 Cal. 237.

A condition in a will providing for a legacy to a woman in case of widowhood or divorce is not contrary to public policy. 80 Cal. 452.

In an action for divorce or the annulment of a marriage, a cross-complaint may be filed, and is allowable. 81 Cal. 182; 82 Cal. 413.

An order committing a defendant for contempt, void on its face, may be tested by *habeas corpus*. 82 Cal. 110; 82 Cal. 413.

The future earnings of a husband after divorce ought not to be charged with the support of the wife. 82 Cal. 110. *Per contra*, 83 Cal. 460.

In a suit for divorce on the ground of adultery, defended by a counter-charge of extreme cruelty, a failure to find upon either issue, when there is no sufficient evidence, will not cause a reversal of the judgment. 82 Cal. 427.

An action for divorce is based on a breach of "contract." In such cases the plaintiff cannot dismiss after a cross-complaint has been filed. 82 Cal. 413.

Settlement of property rights is incident to every divorce suit, either through the complaint or cross-complaint. 82 Cal. 413.

After trial, it is too late to object that the supplemental cross-complaint, on which the decree was granted, sets up a new cause of action. 83 Cal. 633.

Any part of a final decree is appealable, whatever its nature. 83 Cal. 633.

The court has discretion to set aside a decree, where the opposing party was absent from the trial through excusable mistake as to the department. 83 Cal. 457.

A judgment of divorce is effective from the time when the order is rendered and entered on the minutes. 83 Cal. 415.

The entry of the decree *nunc pro tunc* is conclusive as to all matters of evidence necessary to its validity. 83 Cal. 415.

Extreme mental cruelty as a ground of divorce requires actual or probable injury to the body or health of the complaining party. 85 Cal. 251. (McFarland, J., and Paterson, J., dissenting.)

Grievous mental suffering is not the equivalent of extreme cruelty, in a legal sense. A finding that the defendant called the plaintiff vile names, but that such conduct did not injure her health, will not support a decree of divorce. 85 Cal. 251.

A decree of divorce will be set aside when it is shown that the defendant was insane at the time of the service of summons on her. 85 Cal. 108.

A finding that defendant left the plaintiff and did not return is not inconsistent with the finding of non-desertion. 86 Cal. 219.

Testimony of a wife as proof of her justification of her leaving her husband because of his cruel treatment need not be corroborated, to constitute a defense to his suit. 86 Cal. 219.

A judgment granting a divorce to the wife for adultery, and awarding her the whole of the community property, held proper. 86 Cal. 219.

Where the validity of an antenuptial contract as to the property was litigated by content in a divorce suit, it cannot be objected to

for the first time on appeal that it should be in a separate action. 86 Cal. 219.

An order denying counsel fees and alimony is appealable. 86 Cal. 212.

Alimony *pendente lite* for counsel fees should be refused, where the counsel has contracted to give his service for a share of the property to be recovered as a result of the suit. 86 Cal. 212; 86 Cal. 216.

The effect of the reversal of an order denying a new trial in divorce is to vacate and set aside the decree and the judgment for costs and alimony. 84 Cal. 424.

Conflict between state and federal courts relating to actions on marriage contracts. 84 Cal. 424.

An order requiring the defendant to pay to plaintiff's counsel attorney's fees for the use of the plaintiff is not improper. 79 Cal. 515. See 75 Cal. 37.

See COMMUNITY PROPERTY; HOMESTEAD; HUSBAND AND WIFE; JURISDICTION; MARRIAGE.

DOCKET.

See JUSTICE OF THE PEACE.

DOGS.

Dogs are animals for the malicious killing of which an action lies. 80 Cal. 545.

DRAFT.

See NEGOTIABLE INSTRUMENTS.

DRAINAGE ACT.

See CONSTITUTIONAL LAW.

DRUNKENNESS.

See CRIMINAL LAW; DIVORCE; EVIDENCE.

DUPONT STREET IMPROVEMENT.

See CONSTITUTIONAL LAW.

DYING DECLARATIONS.

See CRIMINAL LAW; EVIDENCE.

EASEMENT.

A transfer of real property passes all easements attached thereto or appurtenant there-

with. Water running from a spring or tunnel may be acquired under the laws of appropriation of water. 69 Cal. 221.

The owner of land subject to an easement for a highway may maintain ejectment against an intruder. 69 Cal. 203.

Essentials of the right of way by prescription defined. 71 Cal. 456; 71 Cal. 62.

A right of way of "necessity" may be designated by the grantor, and if he fails to do so, by the grantee. 71 Cal. 65. It only continues so long as the "necessity" exists. 71 Cal. 65.

A ditch and water right used as appurtenant to a homestead cannot be sold under execution. 72 Cal. 477.

A prescriptive right to an easement may be pleaded as provided by section 458 of the Code of Civil Procedure. 72 Cal. 75.

In an action to quiet title, the finding that a certain water-ditch and water right were not attached as an easement, held supported by the evidence. 73 Cal. 550.

There is no authority either under section 1238 of the Code of Civil Procedure or section 2338 of the Revised Statutes of the United States for the condemnation of a right of way for the private use of a mine-owner in working his mine over the patented land of another, where the patent itself contains no reservation. 73 Cal. 452.

A deed to a right of way in consideration of the use of waste water does not imply that such waste water shall be provided. 73 Cal. 249.

A tenant in common in land cannot burden the interest of his co-tenant by granting an easement. 74 Cal. 156.

An owner of land supplied by a water-ditch who sells a portion thereof includes in such sale the use of such ditch for the portion sold, by way of easement. 75 Cal. 250.

An owner of a house upon a private alley that is appurtenant to the lots adjoining is entitled to an injunction to abate an impediment to its free use. 76 Cal. 472.

In pleading an easement claimed under an agreement, it is not necessary to allege that such agreement was in writing. 76 Cal. 197.

An easement over another's land must be kept in repair by the owner of the easement, and he may enter such land to make such repairs when necessary. 78 Cal. 546.

In such case the owner of the land has a right to use it in any ordinary manner, regardless of injury to such easement. 78 Cal. 548.

An agreement for a party-wall confers an easement only to use the wall as a party-wall. Each party owns the half that is upon his land. 81 Cal. 584.

A parol license may be revoked before execution. Expenditures upon the good faith of such license may be set up as an estoppel, but the evidence thereof should be clear,

and the expenditures not merely trivial. 81 Cal. 587.

A contract for the sale of land, including certain rights of roadway, should be construed to mean only a right of way over the land on which such roadway passes. 81 Cal. 634.

Section 801 of the Code of Civil Procedure merely defines the different kinds of easements, but does not affect to describe the mode by which they may be acquired. 83 Cal. 515.

An owner of an upper tract has an easement for the flow of natural surface waters over the land of the lower proprietor. 83 Cal. 515.

Right of a land-owner to erect a levee which increases the accumulation of flood waters above him. 83 Cal. 515.

An omission to use an easement when not needed does not break the continuity of use necessary to create a prescriptive right. 83 Cal. 10.

Way of necessity defined. 85 Cal. 131.

Where a party enters into a verbal contract with another to build a ditch on the land of such party for their joint benefit, and such agreement is executed, the contract is one of purchase, and not one of mere license. 87 Cal. 126.

Ejectment will not lie for an easement. 86 Cal. 279.

Where the revocation of a license would operate as fraud upon the licensee, who has made improvements upon the face of it, equity will hold the owner of the land as a trustee to prevent such revocation. 87 Cal. 126.

The owner of land subject to an easement for a highway may maintain ejectment against an intruder. 69 Cal. 202.

See WATER RIGHTS.

EJECTMENT.

The plaintiff in ejectment must allege and prove that the defendant was in possession of some of the land in dispute when suit was begun. 68 Cal. 561.

An admission in a separate defense should be confined to that defense. 68 Cal. 561.

A nonsuit lies for such of the land as the defendant was not in possession of when suit was begun. 68 Cal. 561.

A disclaimer or judgment in favor of plaintiff is admissible evidence for him, as against the plea of the statute of limitations. 68 Cal. 561.

In ejectment, the equitable issue should be first tried, but irregularity therein will not be considered on appeal unless excepted to, and acquiescence waives such irregularity. 68 Cal. 184; 68 Cal. 272.

The owner of land subject to an easement

for a highway may maintain ejectment against an intruder. 69 Cal. 202.

Where there is no conflict in the evidence, the court may direct the verdict. 69 Cal. 132.

A pending action in unlawful detainer cannot be pleaded in abatement in ejectment. 69 Cal. 611.

Insufficient cause for intervention by a landlord in ejectment, between his tenant and a third party, where collusion is claimed. 69 Cal. 572.

A writ of restitution cannot dispossess a person not a party to the suit, but a stranger. 69 Cal. 572. See 77 Cal. 52.

One judgment in ejectment is no bar to a subsequent suit for the same land between the same parties, where a new title has in the mean time been obtained. 69 Cal. 188.

In an action in ejectment, a deed is admissible without proof of the payment of the consideration. 69 Cal. 611.

Where both parties claim to deraign title from a common source, evidence is unnecessary that such common source was valid. 70 Cal. 296.

In an action of ejectment, a general verdict is sufficient. 70 Cal. 445.

The death of the landlord ends a tenancy at sufferance or at will, and dispenses with notice as prerequisite to a suit in ejectment. 70 Cal. 445.

What evidence of unlawful withholding is sufficient. 71 Cal. 493.

Notice of *lis pendens* applies to suits in ejectment since May 1, 1872. 71 Cal. 470.

In ejectment, the declarations of a prior owner of the land while in possession held admissible against his grantee. 71 Cal. 98.

A judgment roll in unlawful detainer is not evidence of title in a suit in ejectment. 71 Cal. 470.

In ejectment, where the defense is equitable, the defendants are not entitled to a jury. 71 Cal. 429.

Facts showing a title by adverse possession held sufficient. 72 Cal. 104.

Evidence held to be improper, under a stipulation filed in the case; necessity that plaintiff be in possession in trespass. 72 Cal. 371.

An action in ejectment cannot be joined with an action for damages done to other land belonging to plaintiff. 72 Cal. 322.

Case in which a defendant could not justify his ouster by showing title in third persons. 72 Cal. 104.

A case in which an action by a lessor against the lessee in ejectment does not bar a subsequent action for damages by the lessor for a breach of covenant in a lease. 72 Cal. 498.

In an action for ejectment, the description in the complaint may be altered by amendment. 72 Cal. 376.

In an action of ejectment by a vendor against a vendee holding under contract,

that the partial payment has not been refunded is no defense. 72 Cal. 1.

In ejectment, a denial of ownership and right of possession puts in issue the entire cause of action, even though other allegations are not denied. 73 Cal. 520.

A failure to find on certain issues in ejectment held not cause for reversal. 73 Cal. 174.

A verdict will not be set aside for want of evidence as to the statute of limitation, where there is a substantial conflict. 73 Cal. 52.

Specifications in a motion for a new trial, for insufficiency of evidence on the points of ownership and ouster, held sufficient. 73 Cal. 166.

In an action of ejectment against Indians by the grantee of a patent, the latter may show that their rights were therein reserved. 74 Cal. 628.

A party in possession of public lands under the possessory act of the state passed April 20, 1852, may maintain ejectment against an intruder. 74 Cal. 508. See 83 Cal. 167.

An action for ejectment against a trustee is no bar to an action against him to establish a trust. 74 Cal. 435.

A finding in ejectment that the plaintiff was in possession when suit was brought is not fatal to the judgment for plaintiff, where the pleading and other findings show the defendant in possession at that time. 75 Cal. 326.

A party who makes homestead entry of public land can successfully defend in ejectment against a mere prior possessor. 75 Cal. 584. In such case, the homestead papers do not tend to show possession; and actual possession under the homestead laws could not be secured, even peaceably, against a mere occupant without title. 75 Cal. 589. *Per contra*, 78 Cal. 296; 83 Cal. 167.

A plaintiff in ejectment may obtain a preliminary injunction against the commission of irreparable waste. 75 Cal. 620.

A party having an equitable title in land, caused by mistake in a deed, may defend against ejectment without asking for a reformation of such deed. 75 Cal. 155.

An equitable defense called a "cross-complaint" may be treated as part of the answer, and not as a cross-complaint. 75 Cal. 154. See 72 Cal. 1.

A judgment in favor of the defendant for costs, under special verdict, held not conclusive as to plaintiff's title. 76 Cal. 230.

A motion for a nonsuit in ejectment held properly overruled. 76 Cal. 476.

In an action for ejectment, under a general denial, evidence to show the illegality of the consideration is proper. 76 Cal. 206.

A writ of possession will not run against a person having no privity with any other party to the suit; nor is such person affected by the notice of *lis pendens*. 77 Cal. 52.

The plaintiff in ejectment must show that

the defendant was in possession of some definite portion of the land. 77 Cal. 85.

A party who recovers judgment in ejectment is not debarred from a subsequent suit against the same party for the same land, if such party persists in retaining possession. 77 Cal. 69.

A party claiming title through an execution sale under a judgment for a deficiency under a foreclosure sale must introduce such judgment, and the return of the sheriff showing the deficiency, in evidence. 77 Cal. 461.

A state patent is *prima facie* evidence of title, at least. 78 Cal. 380.

An erroneous conclusion of law in ejectment is immaterial if the judgment itself is correct on the findings. 78 Cal. 245.

Certain findings in ejectment held supported by the evidence. 78 Cal. 232.

A certain cross-complaint in ejectment, alleging fraud and collusion in securing a patent, held insufficient. 78 Cal. 511.

An agreement to convey to an attorney, in compensation for services, cannot be avoided as illegal. 79 Cal. 140.

An equitable defense in ejectment must be complete, and show immediate right of possession. 79 Cal. 433.

Sufficiency of findings in. 84 Cal. 104; 84 Cal. 541.

A violation of a contract because of unforeseen impediments is no excuse for failure to perform a condition concurrent. 79 Cal. 433.

The findings of a jury on an equitable defense are not binding on the court. 79 Cal. 433.

A judgment in an action for waste relates only to real property, and is no bar to a subsequent action for trover. 79 Cal. 51.

Two actions for ejectment between the same parties for distinct tracts of land may be properly consolidated. 80 Cal. 3. 3.

A deed to members of the same firm enables any one partner to maintain ejectment against an intruder. 80 Cal. 323.

The defense that the deed relied on by plaintiff was a mortgage is not an equitable defense, and may be reached by a denial of plaintiff's ownership. 80 Cal. 323.

A defense under the statute of limitation must prove either that no taxes were levied and assessed, or that he paid them all. Presumptively, the assessor did his duty. 80 Cal. 605.

Pleading under the statute of limitation. 72 Cal. 75.

In an action of ejectment, where the defendant claims title under a constable's deed, a prior adjudication as to the validity of the judgment through which it was executed is conclusive as to such validity. 80 Cal. 38.

One tenant in common may maintain ejectment against an intruder without joining his co-tenant. 80 Cal. 629.

The judgment of one tenant in common

against an intruder inures for the benefit of his co-tenant, not suing. 80 Cal. 368.

The possession of an administrator cannot be adverse to the heirs. The heirs can dispose of the land and maintain an action to recover possession as against any one, except the administrator. 85 Cal. 155.

A judgment in ejectment against a tenant held admissible for certain purposes in a suit against the landlord. 85 Cal. 155.

In an action of ejectment, the validity of a United States patent may be attacked by showing that the land was not such as the government, or its officers, had the power to convey. 85 Cal. 448.

An averment that plaintiff is the owner in fee-simple is not demurrable on the ground that it is a conclusion of law, and not of any ultimate fact. 86 Cal. 128.

A mere clerical error in the finding will not invalidate it. 86 Cal. 128.

A finding that the defendant ousted the plaintiff is sufficient. The word "wrongfully" need not be used either in the complaint or findings. 86 Cal. 128.

A judgment is not a bar to a subsequent suit as to any facts occurring subsequent to such judgment. 86 Cal. 110.

Where neither the ouster nor the damages are denied, it is proper to render judgment on the pleading for the damages claimed, without any proof as to the amount. 86 Cal. 110.

Ejectment will not lie for a mere easement because possession cannot be delivered. 86 Cal. 279.

A grantee from a mining company cannot maintain ejectment under his deed without showing that it has been ratified by two thirds of the stockholders. 81 Cal. 356.

Description of land in a complaint and judgment, where the initial point is definitely fixed, held sufficient. 82 Cal. 19.

In an action of ejectment, the abandonment of a lease may be shown by circumstances and inference. 82 Cal. 610.

A vendee in possession under a contract which he has broken cannot set up such contract as an equitable defense to ejectment. 82 Cal. 642; 81 Cal. 122.

A vendee in possession under a broken contract cannot set up as an equitable defense in ejectment, or by way of set-off, the improvements which he has made on the land. 82 Cal. 122.

A plaintiff in ejectment must show that he was entitled to possession at the time he commenced his action. 87 Cal. 34.

Where a defendant admits that he is in possession, his tenant from month to month need not be made a party defendant. 87 Cal. 84.

A judgment in ejectment which fails to describe the land in accordance with the complaint or answer, either directly or by

reference to anything on the record, will be set aside upon appeal. 87 Cal. 23.

A judgment on the pleadings is improper, where the defendant's answer denies plaintiff's right of possession. 87 Cal. 422.

See ADVERSE POSSESSION; PLEADINGS; STATUTE OF LIMITATION.

ELECTION.

Evidence held insufficient to show that a beneficiary elected to take under the will. 77 Cal. 313.

Evidence held to show that a beneficiary elected not to take under the will. 70 Cal. 424.

Sufficiency of notice by mortgagees that he considered the entire debt due. 72 Cal. 568.

Election of defendant to set up a counterclaim. 72 Cal. 224.

Election by partners to consider partnership dissolved because of hostile acts of co-partners. 47 Cal. 280.

Intention of testator that wife should elect to claim or disclaim under the will. 74 Cal. 93.

The probating of a will by a wife not proof of her election to take under it. 77 Cal. 313.

Ratification of a sale held equivalent to an election to treat it as valid. 77 Cal. 267.

To compel a widow to elect to take under the will or disclaim, the intent of the testator must be clear. 81 Cal. 240.

Notice of a municipal election held sufficient. 70 Cal. 461.

Election for Santa Cruz Water Works bonds held premature. 74 Cal. 222.

Injunction relative to carrying out illegal elections as to moving county seat. 75 Cal. 179.

In election contests, the ballots are proper evidence, and may be produced for this or any other purpose in evidence. 80 Cal. 359.

A tax-payer is a proper plaintiff to restrain the issuance of illegal bonds. 80 Cal. 359.

Sufficiency of words on a ballot for bridge bonds considered. 80 Cal. 359.

It is not error, when a number of illegal ballots are found, to divide them between the respective candidates. 83 Cal. 70.

Under the laws of 1890, party ballots fraudulently pasted over must be counted for the candidates of the party whose ballots were thus changed. 83 Cal. 70.

Misconduct of an election board will warrant the exclusion of the entire vote of the precinct, if the board has disregarded mandatory law. It is only the laws relating to the time and place of holding elections, the qualifications of the voters, and such others as are made essential to the validity of an election, that are *mandatory*. 83 Cal. 70.

The Kern County bond election held to be invalid under the County Government Act. 83 Cal. 149.

Incorporated towns in which there is no street-work done may be included in a road-district election. 79 Cal. 472.

The supreme court has appellate jurisdiction in a contest over the election of a sheriff. 79 Cal. 477.

It is error to refuse a continuance for the purpose of showing fraudulent ballots in an election contest, where affidavits and other evidence as to such testimony has been presented. 79 Cal. 477.

The public have such an interest in an election contest that the utmost opportunity should be given to arrive at a right conclusion in the contest. 79 Cal. 477.

Proclamations for election as to irrigation bonds held sufficient. 79 Cal. 351.

The provisions of the Oakland charter of 1854 is repealed by sections 1111 et seq. of the Code of Civil Procedure, which provide for the determination of election contests by the superior court. 87 Cal. 124.

See BONDS; MUNICIPAL CORPORATIONS.

ELEVATOR.

See COMMON CARRIERS.

EMBEZZLEMENT.

See CRIMINAL LAW.

EMINENT DOMAIN.

See CONDEMNATION OF LAND; HIGHWAYS; RAILROADS; WATER RIGHTS.

EMPLOYERS AND EMPLOYEES.

The foreman of a gang of men held not a "fellow-servant," for whose negligence his employer is not responsible. 68 Cal. 223.

Where an employer repudiates a contract of employment, his employee may recover on a *quantum meruit*. 69 Cal. 643.

An employer owes the duty to his employees, of using suitable and safe machinery, and will be liable for injuries caused by a failure to do so. 70 Cal. 261.

An employer is not liable to his employee for defects in machinery which the latter had means of knowing. 70 Cal. 261.

The brakeman and conductor of a railroad train are "fellow-servants." 72 Cal. 523.

Notice of the death of an employer generally ends a monthly employment. 76 Cal. 508.

In a suit for damages caused by negligence, a nonsuit as to one cannot prejudice the case against the others. 79 Cal. 44.

The doctrine of *respondent superior* does not apply to an independent contractor. 81 Cal. 265.

In an action upon a *quantum meruit* for services, where the answer claims a special contract, the burden of proof is on the defendant. 85 Cal. 142.

A contract by which the employment was to be "permanent" means only indefinite, or so long as both desire. 81 Cal. 596.

See CONTRACTS; NEGLIGENCE; RAILROADS.

ENTRY.

See FORCIBLE ENTRY; EJECTMENT.

EQUALIZATION (BOARD OF).

See BOARDS.

EQUITY.

In imposing conditions of relief from mistake, equity is not confined to the strict legal rights of the parties, but will take into consideration all the circumstances, in order to arrive at justice. 78 Cal. 278; 75 Cal. 134; 85 Cal. 137.

It is not necessary to show that a verdict in an equity case has been adopted by the court. 85 Cal. 574.

Where there is an adequate and speedy remedy at law, neither party is entitled to assistance in a court of equity. 85 Cal. 385.

Circumstances under which a court of equity will interfere in cases of mistake. 85 Cal. 610; 85 Cal. 488.

Circumstances under which a court of equity will interfere in relation to trusts. 85 Cal. 1; 85 Cal. 177; 85 Cal. 436; 85 Cal. 488.

Where a court has jurisdiction over the person of a defendant, it has power to decree a conveyance by him of property outside the state. 84 Cal. 100.

A court of equity will not aid the enforcement of a contract founded on fraudulent mining locations. 84 Cal. 409.

An application under section 473 of the Code of Civil Procedure cannot be by a separate suit in equity. 84 Cal. 107.

Equity will keep the legal title and the mortgagee's interest separate, although held by the same power, when necessary for the protection of his rights. 84 Cal. 295.

Equity will not permit litigation by piecemeal, but will determine the whole controversy, so as to prevent future litigation. 86 Cal. 500.

See ESTOPPEL; FRAUD; INJUNCTION; MISTAKE; TRUSTS; WASTE.

ESCROW.

See DEEDS.

ESTATE OF DECEASED PERSONS.

See PROBATE LAW.

ESTOPPEL.

Generally. 73 Cal. 486; 69 Cal. 142; 74 Cal. 590; 73 Cal. 526; 82 Cal. 135.

An estoppel *in pais* has no greater force than a contract. 68 Cal. 594.

Laches proven held not to bar the seeking of relief by injunction. 69 Cal. 255.

Estoppel *in pais* involves ignorance on one side, and an intentional act or omission on behalf of another to influence such other's conduct. 69 Cal. 255.

The fact that a person does not object to the excavation of a ditch on his land will not estop him from afterwards objecting to its existence. 69 Cal. 255.

Decree of partition is an estoppel. 70 Cal. 362.

The fact that the same payment was set up in another undecided action will not bar its being considered. 72 Cal. 48.

Statements, to operate as an estoppel, must be intended to deceive, or be recklessly made. 75 Cal. 128; 76 Cal. 260.

The dismissal of an action in partition under a special stipulation binds the parties and their privies. 76 Cal. 489.

A certain former adjudication in a water-right contention held not to operate as an estoppel. 80 Cal. 385.

A judgment of a superior court deciding the validity of a justice's court judgment and an execution sale thereunder is conclusive in a subsequent action of the validity of such execution sale, as between both the parties and their successors. 80 Cal. 39.

Case in which a judgment in relation to a judgment for the payment of sick-benefits was held to operate as an estoppel. 82 Cal. 645.

Equitable estoppels must be mutual. 82 Cal. 351.

Estoppel by waiver in insurance matters. 82 Cal. 263.

Estoppel by misrepresentation as to identity. 82 Cal. 77.

A stipulation that a demurrer may be overruled does not waive the right to afterwards object on the grounds of a general demurrer. 82 Cal. 523.

Certain circumstances held not to result in an estoppel against one of the parties. 71 Cal. 169; 71 Cal. 338.

Certain instructions on the subject of estoppel held correct. 76 Cal. 230.

A plea of estoppel by judgment held not sustained. 78 Cal. 289.

An estoppel cannot exist where the party did not rely on the statement alleged to constitute the estoppel. 75 Cal. 464.

An admission or statement made to a third

party does not operate as an estoppel. 74 Cal. 167.

A judgment in ejectment for or against an administrator operates as an estoppel in favor of or against the heir and his grantees. 85 Cal. 155.

A creditor cannot set up want of consideration for a mortgage assigned to him as collateral security after he has realized on the same. 85 Cal. 122.

Case in which a party who purchases at an unauthorized probate sale cannot set up the acquiescence of the heirs as an estoppel against them. 85 Cal. 390.

Before an estoppel by conduct arises, the party claiming it must have relied upon such conduct, and was induced by it to do that which he would not have otherwise done. 86 Cal. 260.

The voluntary dismissal of an action is no bar to another action. 86 Cal. 189.

A judgment of a competent court between the same parties for the same thing is conclusive against a subsequent action, however erroneous it may be. 86 Cal. 591.

A decree in equity may be pleaded in bar against a subsequent action at law. 86 Cal. 591.

A married woman is not estopped by an instrument defectively acknowledged. 74 Cal. 345.

The wife is not estopped by her contract for sale of land, where it is unacknowledged. 83 Cal. 521.

Unconditional delivery of insurance policy as conclusive evidence of payment of the premium. 83 Cal. 246.

An insurance company is bound by the acts of its local agent with general power. 83 Cal. 246.

An estoppel against the mortgagor in fee-simple from denying the title to the property. 83 Cal. 553.

Failure to object to certain improvements made on land claimed by a person held not to estop him in ejectment. 83 Cal. 12.

A mineral patent is conclusive as to the rights of those who have procured the same. 84 Cal. 409.

Where a surviving wife becomes administratrix, and by mistake includes her separate property in the inventory, she is not estopped thereby from claiming the property as her own. 87 Cal. 329.

See EVIDENCE; JUDGMENT; LACHES; MECHANIC'S LIEN; PLEADING.

EVIDENCE.

See CRIMINAL LAW; CONTRACTS.

- I. ADMISSIBILITY.
- II. RECEPTION.
- III. ADMISSIONS AND CONFESSIONS.
- IV. BURDEN OF PROOF.

- V. SUFFICIENCY OF EVIDENCE.
- VI. WITNESSES.
- VII. CROSS-EXAMINATION.
- VIII. IMPRACHMENT OF WITNESSES.
- IX. EXPERT AND OPINION EVIDENCE.
- X. DOCUMENTARY EVIDENCE.
- XI. PREPONDERANCE OF EVIDENCE.
- XII. PRESUMPTIONS.
- XIII. DISPUTABLE PRESUMPTIONS.

I. ADMISSIBILITY.

An answer or complaint that has been amended is not admissible as evidence. 68 Cal. 466; 71 Cal. 126.

A communication made to a person who is an attorney, but not the attorney of the party making it, is not privileged. 68 Cal. 272.

Hearsay evidence is inadmissible. 68 Cal. 109.

An original complaint containing an offer and tender is admissible to prove the same in relation to costs. 69 Cal. 133.

A defendant cannot object to evidence that was too favorable to him. 70 Cal. 116.

The admission of a divorced husband in a contest over a mortgage by the husband and wife is not evidence against the wife, when such admission was made subsequent to the mortgage. 86 Cal. 241.

Where the issue is the performance of a contract, a question as to whether a party had performed all the conditions of his contract is improper, as calling for a conclusion, and asking the witness to decide a question for the court alone to determine. 79 Cal. 433.

Before a witness can testify as to defendant's reputation, it must be shown that he knows what it was in the community where he lived. 70 Cal. 100.

Under section 1951 of the Code of Civil Procedure a recorder's books are not admissible to prove the contents of an instrument, unless the original is accounted for. 70 Cal. 15. But see amendment of 1889 to section 1951 of the Code of Civil Procedure.

The record of a deed is at most only *prima facie* evidence of the genuineness, execution, and delivery of the original. 70 Cal. 362.

Dying declarations as evidence are restricted to the act of killing and to the circumstances immediately attending it, and forming a part of the *res geste*. 70 Cal. 13.

The declarations of a vendor made after the sale are inadmissible against the vendee. 84 Cal. 221.

While the admission of a party is evidence against him, his oral declarations in his own behalf, made in the absence of the opposite party, and not part of the *res geste*, are not admissible for any purpose. 70 Cal. 611. The declarations of a party, however, while engaged in an act, and showing his object and intent, are admissible either for or against him. 71 Cal. 150.

Photographs as evidence. 76 Cal. 597.

An account-book is not admissible without laying the usual foundation. 71 Cal. 30.

On an issue as to the identity of certain property purchased, the conversation that occurred at the sale is admissible. 71 Cal. 30.

A shorthand reporter testifying as to what a witness formerly swore to may refresh his memory from his notes. 71 Cal. 33.

The testimony of a claimant against an estate is not excluded so far as to prevent him from testifying as to the correctness of his books. 71 Cal. 375. An instrument, once admitted in evidence, may afterwards be used by the opposite party to prove other facts. 71 Cal. 470.

In an action for damages, letters written by plaintiff disclaiming that there is anything due him are admissible. 72 Cal. 251.

In a suit of ejectment based on prior possession only, evidence of the title of a third person is inadmissible. 72 Cal. 104.

Declarations by the owner after he parted with the title are not admissible against his grantees. 73 Cal. 518.

A deposition taken under subdivision 1 of section 2021 of the Code of Civil Procedure may be read by either party, though the witness be in court. 83 Cal. 30.

In a suit for unlawful detainer, parol evidence that the defendant "held the legal title" or was "seized in fee" is admissible. 73 Cal. 238.

In an action on a written contract perfectly clear in its terms, parol evidence as to the parties' understanding of its meaning is inadmissible. 73 Cal. 249.

The stenographer's certified transcript in one case is not evidence in another. 73 Cal. 206.

Evidence of a decedent given in a suit afterwards again tried, with an administrator as plaintiff, is admissible in the second trial. 73 Cal. 608.

Abstracts of book-accounts made by experts appointed by the court are admissible as evidence. 73 Cal. 394.

Documentary evidence, once admitted, is evidence for all purposes to which it is relevant; it need not be again presented. 83 Cal. 333.

A point as to the admissibility of evidence cannot be raised for the first time on appeal. 73 Cal. 564.

A complaint in another action, signed on behalf of the plaintiff, may be evidence by way of an admission. 74 Cal. 191.

The great register of the county cannot be used to show that a testator was not of the age stated in the will. 74 Cal. 180.

Parol evidence cannot be given to show what was included in a bill of sale, if such evidence adds to or contradicts it. 74 Cal. 459.

The deposition of a plaintiff, obtained by defendant, may be read in evidence at the

trial, even if the plaintiff is present. 74 Cal. 46.

Error in admitting harmless evidence is not ground for reversal. 75 Cal. 411.

Where a plaintiff relies on an estoppel by the declaration of defendant, the defendant may show that the plaintiff was not deceived, and placed no reliance on such declarations. 75 Cal. 464.

Irrelevant evidence on one side does not justify like evidence on the other side; a witness cannot be impeached on collateral matters. 75 Cal. 111.

A judgment is conclusive evidence not only as between the parties thereto, but their successors in interest. 75 Cal. 177.

A judgment on a general demurrer is *res judicata*. It is conclusive of everything necessarily determined by such judgment. 75 Cal. 176.

A constable's deed is not admissible without proof of the judgment and execution. 75 Cal. 178.

The certified transcript of the shorthand reporter's notes in criminal cases is placed on the same footing as a deposition; but this does not apply to civil cases. 75 Cal. 301.

A deposition under stipulation is governed solely by the stipulation. 75 Cal. 301.

The testimony of an accomplice is admissible. 75 Cal. 301.

In an action against the estate of a deceased woman, for services, proof may be given that they were rendered at the request of one reputed to be her husband. 75 Cal. 290.

Books of account in a certain case held not evidence that no further payments have been made. 76 Cal. 87.

Ownership of land cannot be proven by general reputation. 76 Cal. 394.

Evidence for a party cannot contradict his pleadings, nor that which he admits in his pleadings. 77 Cal. 324.

In a suit on a note, where the direct testimony does not refer to the consideration, it is not proper to cross-examine for the purpose of showing the absence of consideration. 77 Cal. 324.

Notes and mortgages by which property is purchased are admissible as evidence in a contest over its title. 77 Cal. 241.

The proof necessary to admit the deposition of a witness on the ground that he is out of the state may be based on information obtained at his place of business. 77 Cal. 449.

Evidence of statements made by one person are inadmissible for the purpose of contradicting another. 78 Cal. 540.

Declarations made in a letter by a party to a third person are not admissible in his own favor. 78 Cal. 283.

Evidence is admissible at all times to explain a receipt and show the purpose for which it was given. 78 Cal. 15; 79 Cal. 55.

The only remedy for an answer not responsive to the question is a motion to strike out. 84 Cal. 459.

A pleading in a prior action, though afterwards amended, is admissible against the party making it, even if only signed by his attorney. 79 Cal. 23. See 71 Cal. 513; 74 Cal. 191.

An attorney who acts for both parties may be called by either to testify. 79 Cal. 312.

It is error for the court to refuse to allow an intimate friend of a decedent to testify as to facts showing insanity. 79 Cal. 382.

Where a document is claimed to have been forged, evidence that the plaintiff has shown it to a third person a long time previously is admissible as tending to shown it genuine. 79 Cal. 633.

The claim of a person that she was another man's wife may be rebutted by showing that she threatened to bring suit against him for breach of promise of marriage. 79 Cal. 633.

A deposition admissible in an action is admissible in a suit between the successors of the parties on the same issue. 85 Cal. 253.

Genuine signatures may be furnished at a trial for the purpose of comparison with the handwriting in controversy. 80 Cal. 82.

The testimony of a competent witness is proper to show that account-books have been correctly kept. 80 Cal. 275.

Harmless error in the admission of testimony is not ground for reversal. 80 Cal. 275.

A written contract cannot be varied by parol evidence tending to contradict its terms. 81 Cal. 236.

A shop-book of original entries is *prima facie* evidence, if supported by the owner's oath as to its correctness, and no objection appears as to the mode in which it is kept. 82 Cal. 163.

Secondary evidence as to the contents of a deed is admissible where there is no objection that it is not the best evidence. 85 Cal. 1.

Inadmissible evidence not objected to is sufficient proof of the fact to which it relates. 82 Cal. 570.

Before a deed is admitted in evidence, its admissibility should be determined by the court. 82 Cal. 347.

Evidence as to the payment of taxes held not admissible in a certain case. 82 Cal. 170.

Where parol evidence of a written contract is given in a deposition without objection, and was afterwards given at the trial, held that the evidence was admissible. 70 Cal. 610.

Evidence of an expert as to the contents of book-accounts, although made on a superficial examination, held competent in the absence of objection. 85 Cal. 277.

The testimony of a deceased witness is

not admissible in a suit between other parties in a different controversy. 80 Cal. 82.

Press copies of letters are the best evidence next to the original, and where such copies are shown to exist, it is error to allow oral evidence as to their contents. 87 Cal. 209.

Where a partnership is sued, the books of the copartnership are admissible in evidence to show the state of the accounts. 87 Cal. 209.

Where a libel is defended on the ground of its truthfulness, a testimonial signed by prominent citizens, at a date four months earlier, to contradict the statement of the defendant as to the bad character of the plaintiff is not admissible. 87 Cal. 109.

Error in the admission of immaterial evidence is harmless, and not ground for reversal. 80 Cal. 275.

II. RECEPTION OF EVIDENCE.

Where there is no question asked and disallowed upon which an exception could have been reserved, there can be no prejudicial error in the refusal of the court to hear the evidence. 85 Cal. 98.

A court may strike out a leading question. 68 Cal. 109.

Where a part of testimony in another case is read in evidence, the opposite side may introduce the balance. 68 Cal. 12.

Evidence by a party, pretending to disclose the intentions of another, should be stricken out on motion. 69 Cal. 646.

Improper evidence as to a fact that is admitted cannot be prejudicial or ground for reversal. 70 Cal. 98.

Depositions taken by stipulation cannot be objected to on the ground of the want of authority of the officer. 70 Cal. 614.

A stipulation admitting certain facts renders proof of such facts unnecessary. 70 Cal. 374; 70 Cal. 140.

A motion to strike out testimony some of which is proper, but mixed up with some that is improper, must specify the portion objected to. 70 Cal. 449.

Evidence must be excepted to at the trial or it will not be considered on appeal. 71 Cal. 98.

Error in disallowing certain evidence is cured if such evidence is afterwards given. 71 Cal. 493.

An offer to prove by parol facts only provable by writings is properly refused. 73 Cal. 238.

After the plaintiff has closed his case in rebuttal, the court may permit the defendant to testify. 74 Cal. 3.

A witness who admits that he has an interest in the claim which is against the decedent's estate is incompetent. 84 Cal. 185.

An objection to evidence which is relevant, but incompetent, cannot be made on the ground that it is irrelevant and inadmissible. 75 Cal. 356.

A harmless error in admitting testimony is not ground for reversal. 76 Cal. 131.

Error in admitting irrelevant evidence must be objected to on the ground of being "irrelevant," to be reviewed on appeal. 76 Cal. 287.

Error in admitting evidence because involving variance must be objected to on the ground of variance, to be reviewed on appeal. An objection that it was "immaterial, irrelevant, and incompetent" does not reach the point. 76 Cal. 264.

An objection to the admission of evidence must particularly specify the ground of the objection to be considered on appeal. 76 Cal. 230.

Objections to a patent on the ground of irregularity cannot be made for the first time on appeal. 77 Cal. 300.

When a question is asked, objected to, the objection overruled, and exception taken, and then withdrawn, only to be again put in substantially the same form, the exception should be regarded as duly taken, even though not repeated. 78 Cal. 430.

Evidence once given is, unless expressly limited to a particular purpose, admissible for any purpose to which it is relevant. 78 Cal. 225.

Evidence as to any fact admitted by the answer should be excluded. 78 Cal. 118.

The court has discretion to allow plaintiff to introduce new testimony after defendant has closed his case. 79 Cal. 224.

Leading questions may be allowed by the court in its discretion. 70 Cal. 9.

The court may refuse to allow a party to repeat his testimony. 80 Cal. 146.

A question which is not apparently material will not be considered material on appeal, unless an offer is made of what is proposed to be proven by it. 80 Cal. 82.

Error in admitting, or refusing to admit, evidence may be cured by the subsequent proceedings. 81 Cal. 106.

Secondary evidence must be objected to, or the objection is waived. 81 Cal. 87.

Documents not actually filed in evidence evidence, but so understood, will be considered as such. 81 Cal. 87.

The allowance of leading questions is discretionary. The admission of irrelevant evidence when the case is tried by the court is not ground for reversal, unless it appears that the court relied on it in deciding it. 82 Cal. 427.

Evidence should only be considered so far as it relates to the case on trial. 82 Cal. 14.

A party who claims that a communication was confidential must show it to be so. 82 Cal. 474.

Where a party has been fully examined in court, it is discretionary with the court to allow his deposition previously taken to be read in evidence. 82 Cal. 278.

A bench-warrant for a witness need not be

issued unless an affidavit is made showing what might be proven, or that the witness could be reached by such process. 70 Cal. 98.

In an action to condemn land, the initial point of a survey may be proven by common reputation or hearsay. 83 Cal. 240.

The acts and declarations of a vendor are competent to show how the vendee took possession of the land. 84 Cal. 126.

III. ADMISSIONS AND CONFESSIONS.

A petition for letters of administration is a pleading, and the rules in regard to admissions apply to it. 71 Cal. 513.

Unless a pleading is signed by a party, or by his authority, it is not an admission of any fact; nor is a pleading drawn by an attorney necessarily an admission on behalf of his client. 71 Cal. 513.

Admissions made for the purpose of arbitration are not evidence in a collateral action. 71 Cal. 515.

The declarations of a prior owner of land as to its boundaries are admissible, if made while such owner. 71 Cal. 98.

A prior complaint by the plaintiff in another action may be proper evidence by way of admission. 74 Cal. 191.

A defendant in a criminal action cannot be questioned as to other statements contradictory of his evidence, and tending to show that he admitted the crime. The fact that this is done solely to impeach him does not alter the rule. 75 Cal. 415.

Where a written confession is given in evidence, the defendant may show that when it was being written she persisted in protesting her innocence. 75 Cal. 416.

An admission made by a decedent is proper evidence against his executor. 75 Cal. 277.

The acts and declarations of one co-tenant in the hearing of the other, as to their rights, are admissible in evidence. 79 Cal. 304.

Evidence that on a former trial the defendant admitted that the decision against him was just is admissible. 82 Cal. 14.

A party objecting to the admission of evidence must point out the ground of his objection. A general objection is only sufficient where the evidence is totally inadmissible for any purpose. 87 Cal. 471.

An objection that a question is incompetent, irrelevant, and immaterial does not raise the objection that the witness was not shown to be qualified to answer. 87 Cal. 471.

The issue as to the validity of a will must be determined by the evidence introduced at the trial. Facts stated for the first time in the argument cannot be considered. 87 Cal. 155.

Where a judge inserts in a statement on a motion for a new trial certain facts not in evidence, it will be presumed that the court was influenced thereby, and the judgment will be reversed. 87 Cal. 155.

IV. BURDEN OF PROOF.

The burden of proof never shifts as to reasonable doubt, where the defense is confined to the original transaction. 69 Cal. 601.

Where crime has been proven, the defendant must show just fiat on by preponderance of evidence. 71 Cal. 1; 71 Cal. 602. *Per contra*, 80 Cal. 160; 81 Cal. 142; 85 Cal. 41.

In a suit for malicious prosecution, the burden of showing want of probable cause is on the plaintiff. 71 Cal. 89.

In an action for negligence, the burden of proof is on the plaintiff to show negligence, and injury therefrom. 72 Cal. 245.

In an action against a medium, the burden of proof is on the medium to show she did not exert undue influence. 72 Cal. 556.

The rule that where there is a substantial conflict of evidence the appellate court will not interfere, held to apply to contests over water rights. 85 Cal. 555. (See PREPONDERANCE OF EVIDENCE, under this title.)

See CONTRACTS; EMPLOYER AND EMPLOYEE.

V. SUFFICIENCY OF EVIDENCE.

The "moral certainty" required by section 1826 of the Code of Civil Procedure is produced when a matter is proven to the satisfaction of a jury by a preponderance of evidence. 80 Cal. 574.

A verdict will not be set aside as not supported by the evidence, unless, in the judgment of reasonable men, no such deduction as that expressed therein could be properly drawn from the evidence. 68 Cal. 33.

Where a negative is to be proven, slight proof makes out a *prima facie* case. 83 Cal. 70.

VI. WITNESSES.

A witness cannot refresh his memory from his affidavit, when. 68 Cal. 109.

A witness has a right to object to answering a question that would tend to criminate him. 70 Cal. 51.

A person is not disqualified to be an interpreter because he is also a witness for the prosecution. 70 Cal. 8.

A witness cannot testify as to his impressions of the intentions of another in doing certain acts. 71 Cal. 149.

A witness who testifies to a part of a conversation may be cross-examined as to the balance. 71 Cal. 30.

It is not offensive to ask a witness to state only what he knows. 72 Cal. 303.

Where an answer is responsive to a question, it cannot be stricken out on the ground that it was hearsay. 75 Cal. 277.

Where a witness testifies as to mere matters of opinion, it is not error to strike out such testimony. 76 Cal. 649.

The declarations of a plaintiff, made in the absence of the defendant, are not evidence of anything in his own behalf. 76 Cal. 606.

Photographs of the premises are admissible as evidence respecting description. 78 Cal. 597.

Communications to a person who is an attorney, not made in the course of his professional employment, are not privileged. 79 Cal. 633.

Presumptively, all communications between attorneys and clients are confidential. 79 Cal. 633.

A defendant cannot be cross-examined as to conversations held with a woman who was at that time his wife, though since then divorced. Persisting in asking such a question, if it tends to prejudice the jury, and is allowed, is error. 83 Cal. 133.

Where an improper question is answered before an opportunity is given for objection, it is the duty of the court to strike out such answer. 86 Cal. 483.

The rule as to conflict of evidence applies to cases of the self-contradiction of a witness. The conflict is all the more fatal for being intestine. 87 Cal. 581.

VII. CROSS-EXAMINATION; WITNESSES.

A witness may be cross-examined for the purpose of showing his hostility. 69 Cal. 643.

Cross-examination must be responsive to the examination in chief. 69 Cal. 646.

Any acts of witness showing hostility may be shown on cross-examination. 70 Cal. 116.

A question on cross-examination calling for the inference of a witness should be excluded. 70 Cal. 131.

Where a witness testifies that he bought a promissory note, on which suit was brought, for a valuable consideration, it is proper to ask him on cross-examination if he knew at the time that it was executed for an illegal consideration. 83 Cal. 173.

A refusal to permit cross-examination on a material point is not prejudicial error if there is satisfactory evidence on the same point from other sources. 73 Cal. 200.

It is error to permit irrelevant matter to be rebutted against objection. 75 Cal. 103.

A question not responsive to evidence given on examination in chief is not proper cross-examination. 77 Cal. 324.

In a suit on a note, where the direct testimony does not refer to the consideration, it is not proper to cross-examine for the purpose of showing the absence of consideration. 77 Cal. 324.

The cross-examination of a witness is largely in the discretion of the court. 77 Cal. 579.

A witness may be cross-examined to test his credibility, knowledge, or recollection. A refusal to allow this is error for which a judgment will be reversed. 79 Cal. 404.

A witness cannot be cross-examined upon irrelevant matters for the purpose of eliciting something to be contradicted. 81 Cal. 103.

When a party accused of murder becomes a witness in his own behalf, a wide latitude of cross-examination is permissible. 83 Cal. 138.

It is an objectionable mode of cross-examination to read to a witness, who is a party, from his deposition, and ask him if such answers were correct. The deposition, or any part thereof, may be offered in evidence for the purpose of impeachment. 82 Cal. 427.

A witness may be cross-examined so as to lay the foundation for impeachment by asking him if he did not offer to another party to suppress the testimony he had given for a consideration. 86 Cal. 483.

VIII. IMPEACHMENT OF WITNESS.

A witness cannot be impeached by contradicting purely collateral testimony called out by his cross-examination. 86 Cal. 483.

When a defendant becomes a witness in his own behalf, he may be impeached by evidence as to his general reputation for truth, honesty, or veracity, like ordinary witnesses. 77 Cal. 7.

A witness is competent to testify as to the reputation of another witness without his having heard such reputation discussed. 79 Cal. 69.

A witness cannot be impeached by evidence of particular wrongful acts, nor can he be cross-examined as to such acts. 79 Cal. 633; 81 Cal. 103.

A witness may be cross-examined as to statements made by her inconsistent with her direct testimony. 71 Cal. 618.

A witness may be cross-examined as to collateral matters of a similar character occurring about the same time, for the purpose of testing his recollection and accuracy. 84 Cal. 617.

An objection to a preliminary question cannot be sustained on the ground that the question itself might be improper. 73 Cal. 106.

A witness may be impeached by showing that his testimony was given under the influence of a motive prompting him to make a false statement, and that prior to such motive he made different statements. 74 Cal. 1.

A witness cannot be impeached by showing that he made contradictory statements, unless his attention has been first called to such statements. 74 Cal. 3.

A witness cannot be discredited by asking him if he has not been impeached in another case. 76 Cal. 192.

A witness who denies on cross-examination that he offered to procure testimony for money may be impeached by evidence to the contrary. 68 Cal. 200.

The testimony of an impeached witness may be disregarded by the jury, and the court may so instruct. 70 Cal. 61.

The answers of a witness on cross-examination concerning collateral matters are conclusive, and as to them he cannot be contradicted or impeached. 70 Cal. 120.

A witness cannot be cross-examined as to his being jailed or convicted of a misdemeanor; such evidence is limited to felonies. 71 Cal. 195.

A witness may be impeached by showing on his cross-examination that he had expressed himself friendly towards the party in whose behalf he testifies, and declared a desire to suppress such facts as might injure him. 85 Cal. 350.

A witness cannot be impeached by showing his want of religious belief. 71 Cal. 548.

A witness cannot be impeached by evidence of particular wrongful acts, or by asking him whether he had been arrested, pleaded guilty, and paid a fine for beating a woman of the town. 87 Cal. 109.

Sufficiency of objections to questions put to a witness for the purpose of impeaching them considered. 87 Cal. 109; 87 Cal. 413.

IX. EXPERT AND OPINION EVIDENCE.

A physician cannot testify as to the eyesight of two persons, under certain conditions, unless he has examined them. 70 Cal. 98.

A non-expert witness may testify as to the mental condition of a particular person, if sufficiently acquainted. The court in its discretion determines his competency. 71 Cal. 618.

Any witness to a crime may testify as to whether the defendant appeared rational or irrational at the time. 71 Cal. 351.

Expert evidence is admissible to show the meaning of technical terms in a contract. 72 Cal. 278.

Any witness may testify as to the apparent sobriety of a defendant when the offense was committed. 73 Cal. 7.

The fact that a witness is qualified as an expert as to earthen dams is not evidence of his ability to testify as to wooden dams. 83 Cal. 198.

A question calling for the opinion of the witness upon an incorrect legal proposition should be excluded. 76 Cal. 355.

Evidence of a person not an expert, as to the sufficiency of a manufactured article, is not admissible or entitled to be regarded as evidence sustaining a verdict. 78 Cal. 410.

An expert may be allowed to testify for defendant, after plaintiff has closed his rebuttal. 79 Cal. 69.

A witness cannot testify as to the genuineness of a signature without proof of being qualified as an expert, unless he has seen the party write or is familiar with his handwriting. 80 Cal. 448.

The cross-examination of a party or of an expert should be allowed a liberal range, touching all matters testified to in chief, or tending to test the temper, bias, motives,

intelligence, accuracy, credibility, or means of knowledge of the witness. 87 Cal. 464.

See CRIMINAL LAW.

X. DOCUMENTARY EVIDENCE.

Parol evidence is inadmissible to show that a certain matter was not intended to be included in a written contract. 69 Cal. 186.

A dying declaration in writing may be fortified by parol evidence to show the condition of deceased at the time. 70 Cal. 8.

An instrument purporting to be a copy is not evidence, without proof that the original had existed. 71 Cal. 183.

XI. PREPONDERANCE OF EVIDENCE.

A preponderance of evidence is all that is necessary to warrant a verdict for exemplary damages for assault and battery maliciously committed. 74 Cal. 148.

When a witness testifies self-contradictory. 87 Cal. 581.

The positive testimony of witnesses may be overcome by circumstances showing that they are mistaken. The court may reject the most positive testimony, though uncontradicted and unimpeached. Its inherent improbability may deny to it all claims of belief. 79 Cal. 34.

The burden of proof is on a trustee who has derived benefit from his trustor to show no abuse of confidence. 82 Cal. 351.

The burden of producing a preponderance of evidence is upon the party who has the affirmative, and remains upon him throughout the trial. It is different from the burden of making or meeting a *prima facie* case, which shifts back and forth in the course of a trial. 81 Cal. 398. (See BURDEN OF PROOF, under this title.)

XII. PRESUMPTIONS, GENERALLY.

A fact, once shown to exist, is only presumed to continue so long as is usual with things of that nature. 81 Cal. 398.

The salary of a salesman is not presumed to continue at the rate at which it began. 81 Cal. 598.

Marriage may be proven by cohabitation and repute; cohabitation not shown to be illicit is presumed lawful. 82 Cal. 433.

Where there are two presumptions, one in favor of innocence and the other in favor of a criminal course, the former prevails. 82 Cal. 449.

Evidence stricken out cannot be considered on the question of sufficiency of evidence to justify the verdict. 82 Cal. 184.

Presumptively, all the relevant evidence is included in a bill of exceptions. 68 Cal. 590.

Presumptively, the findings are supported by the evidence. 68 Cal. 642.

Presumptively, official duty was performed. 68 Cal. 284.

Presumptions relative to cohabitation and marriage. 82 Cal. 427.

Where two presumptions of the same kind conflict, neither is to be regarded as existing. 79 Cal. 250.

In a complaint asking for the rescission of a sale of certain personal property without stating its value, the presumption will be that it had no value. 82 Cal. 193.

In all trust relations confidence is presumed, and if the trustee has derived any benefits therefrom, the burden is on him to show that confidence has not been abused. 82 Cal. 551.

Rectals in a mortgage are conclusive as between the parties. 74 Cal. 409.

See ACQUIESCENCE; CRIMINAL LAW; PRACTICE; WAIVER.

XIII. DISPUTABLE PRESUMPTIONS.

That libelous matter is false and malicious. 69 Cal. 527.

That a counterclaim is denied. 69 Cal. 133.
That the judgment was properly rendered. 68 Cal. 390.

That a person to whom a note is assigned and delivered is the owner. 69 Cal. 569.

That the owner of land adjoining a street owns to the middle of the way. 69 Cal. 202.

That he map referred to in the deed gives a true description of the property intended to be conveyed. 70 Cal. 487.

That property purchased by a married woman belongs to the community. 70 Cal. 282; 70 Cal. 242.

That a corporation mortgage by its chief officers under its seal is authorized. 70 Cal. 144.

That injury has resulted from error on appeal. 71 Cal. 513.

That land deeded to a married woman "for her sole and separate use" is her separate property. 71 Cal. 419.

That the debtor has been paid the excess arising from the execution. 71 Cal. 254.

That a jury properly instructed decided justly. 71 Cal. 565.

That a new trial was granted after the verdict because of the insufficiency of the evidence. 71 Cal. 221.

That at a certain mode of court procedure was adopted by consent. 71 Cal. 223.

That a certificate of purchase was properly issued. 71 Cal. 21.

In the absence of findings that the court found all the facts in favor of the prevailing party. 72 Cal. 278.

That a certain conversation did not improperly influence a juror. 72 Cal. 187.

That an issue duly raised by the pleadings was not abandoned at the trial. 73 Cal. 93.

That the court instructed the jury to disregard certain assumptions of the opposing counsel made in his address to the jury. 73 Cal. 604.

That a change of attorney from one side to the other prevented the former from having a fair trial. 74 Cal. 386.

That a notice for a motion of new trial was given or waived, where such motion was denied. 74 Cal. 269.

That an order or judgment was not lawfully set aside because improvidently made. 75 Cal. 617.

That a deed was delivered on the date it bears. 75 Cal. 240.

That a judge was duly authorized to act. 75 Cal. 213.

That an agreement required by law to be in writing was in writing. 75 Cal. 253.

That an assessment was legally made. 75 Cal. 443.

That a court ruled correctly. 76 Cal. 621; 77 Cal. 250; 78 Cal. 358; 79 Cal. 50, 266; 81 Cal. 280; 81 Cal. 621.

That the evidence justified the instructions. 76 Cal. 404.

That an erroneous instruction was prejudicial. 76 Cal. 240.

That a judgment was not rendered by consent. 76 Cal. 624.

That where husband and wife of similar age perished in the same calamity, the wife died first. 76 Cal. 649.

That a dismissal for want of prosecution was proper. 77 Cal. 326.

That property acquired during marriage is community property. 78 Cal. 58; 79 Cal. 304.

That the receipt of the United States receiver was properly issued, and is proof of a homestead entry in the land-office. 78 Cal. 296.

That all the proceedings in a trial court were regular. 79 Cal. 501.

That a deed from husband to wife for her separate use is her separate property. 79 Cal. 468.

That a good paper title to land constitutes the holder thereof the owner. 80 Cal. 605.

That corporation directors know at all times the condition of the business and property under their control. 81 Cal. 231.

That a fact once shown to exist continues as long as is usual with things of that nature. 81 Cal. 398.

That a party dealing with a special agent has read his authority. 82 Cal. 1.

That a trial with eleven jurors was consented to. 82 Cal. 523.

That the description of land in a judgment is sufficient. 82 Cal. 19.

EXCEPTIONS.

See BILL OF EXCEPTIONS.

EXECUTION.

The right to claim exemption is lost by failure to claim it. 63 Cal. 11.

A judgment debtor has the option to designate the property to be sold. 70 Cal. 296.

The title secured at the execution sale to real property is not affected by irregularity in the publication of the notice. 70 Cal. 296.

A foreclosure sale will not be set aside for mere inadequacy of price. 70 Cal. 497.

The fact that several lots were sold *en masse* will not of itself render the sale void. 71 Cal. 254.

A judgment is but evidence, and is not subject to levy or sale under execution; the remedy is by garnishment. 72 Cal. 232; 77 Cal. 646.

A purchaser of stock at execution, with notice, obtains no better title than that had by the judgment debtor. 72 Cal. 321.

After an execution has been returned unsatisfied, the plaintiff is entitled to an order commanding the debtor to appear and answer as to his property without any affidavit. 72 Cal. 513.

Supplemental proceedings are not a new action in which a third person can interplead. 72 Cal. 513.

A sale will not be set aside on affidavit showing that the judgment was obtained by fraud or mistake. 73 Cal. 276.

The superior court has power to recall an execution. 74 Cal. 106.

A quitclaim deed under an execution by the holder of a certificate of purchase is equivalent to an assignment of such certificate. 75 Cal. 240.

Exemption under subdivision 6, section 690, of the Code of Civil Procedure, only exists where the articles are those with which the debtor "habitually earns his living." 77 Cal. 194.

The third subdivision of section 690 of the Code of Civil Procedure, relative to exemption, applies to persons engaged in farming. 77 Cal. 194.

The burden is on him who claims exemption to prove it. 77 Cal. 194.

Seats in San Francisco Stock and Exchange Board are property that may be sold under execution. 78 Cal. 351.

If an execution is merely imperfect, it is not void, and it is the duty of the sheriff to serve and return it. 79 Cal. 600.

The five-year period in which execution may issue on a judgment under section 691 of the Code of Civil Procedure applies to foreclosure sales. 81 Cal. 202.

In supplementary proceedings when it appears that property of the judgment debtor was assigned to third parties after the proceedings were begun, the court can only make an order authorizing the creditor to bring suit against such third party, and forbidding its transfer in the mean time. 86 Cal. 615.

An order granting an execution on a judgment after five years from its entry may be annulled on *certiorari*. 86 Cal. 275.

Amended certificate of purchase in. 81 Cal. 356.

An execution sale brought about by agent's conspiracy to defraud, and the purchase of the property by one of the conspirators, held not confer no title. 81 Cal. 356.

Steam-thrasher and outfit held not exempt from execution as farming implements. 71 Cal. 74.

Exemption is waived by a failure to claim it in a reasonable time. 83 Cal. 194.

The husband cannot claim any exemption for himself on the ground that the property is in part the separate property of his wife. 83 Cal. 194.

Property of a teamster exempt from execution. 83 Cal. 153.

It seems that fire-wood may be included under the term of "provisions for family use." 83 Cal. 153.

Foreclosure sale, — stay of execution at the instance of the party in possession. 84 Cal. 85.

A motion in supreme court for a stay of execution must state facts. An affidavit that the party was not "in possession" is insufficient. 84 Cal. 85.

A sheriff's certificate of the sale of land will prevail over an unrecorded deed previously executed by the judgment debtor, and of which the execution purchaser had no notice. 75 Cal. 552.

A jeweler's safe used in his business as a jeweler and watch-repairer is exempt from execution. 87 Cal. 292.

Proceedings supplemental to execution can reach a chose in action arising from torts, and the court may authorize a suit by the creditor to recover such chose in action. 87 Cal. 178.

Statutes exempting property from execution should be liberally construed, as intended to enable the debtor to follow his vocation and earn a support for himself and family. 87 Cal. 292.

The term "implement," as used in the statutes of exemptions, is broader than the term "tool," and includes any instrument needed and used for the purpose of carrying on the trade or business of the debtor. 87 Cal. 292.

The appointment of receivers in supplementary proceedings. 78 Cal. 351; 86 Cal. 615; 87 Cal. 178.

See ATTACHMENT; DEBTOR AND CREDITOR; JUDGMENT.

EXECUTORS.

See PROBATE LAW.

EXEMPTION.

See ATTACHMENT; EXECUTION.

EXPERTS.

See EVIDENCE.

EXTORTION.

See CRIMINAL LAW.

EXTRADITION.

The recitals in a warrant of arrest issued by the governor of the state, upon a requisition, will be *prima facie* taken as true in *habeas corpus* proceedings. 79 Cal. 95.

EXTREME CRUELTY.

See DIVORCE.

FACTOR.

See AGENCY.

FALSE IMPRISONMENT.

Personal liberty cannot be violated by a mere occupant of public land in removing an intruder. 73 Cal. 252.

Restraint, to be illegal, need not be malicious, or without probable cause; whoever imprisons another must show that the imprisonment was lawful. 79 Cal. 30.

FALSE REPRESENTATION.

A party who makes a false representation without belief or without information is chargeable with a knowledge of its falsity. 82 Cal. 351; 84 Cal. 646.

A false representation as ground for rescission must go to the main inducement for the plaintiff in acting, so that without it he would not act. 82 Cal. 351.

Evidence of value and identification of property sold. 79 Cal. 234.

Misrepresentations as to law afford no ground for relief, where there is no confidential relation. 79 Cal. 17.

Relief in equity will not be granted on the ground of false representations, where there has been great carelessness. 79 Cal. 17.

Ignorance of the real facts must be alleged and proven in a cause of false representation. 77 Cal. 347.

A complaint for fraudulent representation must show that plaintiff had been misled thereby. 69 Cal. 536.

See FRAUD, AND FRAUDULENT CONVEYANCES.

FAMILY ALLOWANCE.

See PROBATE LAW.

FEDERAL COURTS.

See CONSTITUTIONAL LAW.

FEEES.

See ATTACHMENT; COSTS; PUBLIC OFFICERS.

FENCE.

See ADVERSE POSSESSION; BOUNDARIES; NEGLIGENCE; TRESPASS.

FINDINGS.

No findings are necessary on a cross-complaint successfully demurred to. 68 Cal. 28.

A finding as to an ultimate fact, prevails over one as to a probative fact. 68 Cal. 618.

A failure to find is immaterial, if not prejudicial. 68 Cal. 528.

In the absence of the record, the sufficiency of the evidence to sustain a finding will be presumed. 68 Cal. 642.

A certain general finding held to be insufficient. 68 Cal. 599.

Certain general findings held to be sufficient. 68 Cal. 146; 70 Cal. 186; 79 Cal. 606.

Findings may be waived by stipulation. 68 Cal. 240.

Certain special and general findings held to be sufficient. 68 Cal. 466.

Findings on the issue of "ownership" held sufficient. 68 Cal. 528.

A finding that a sum is due on a note is equivalent to one that such sum is "owing and unpaid." 68 Cal. 162.

A finding conclusive of all plaintiff's rights is sufficient, without a finding on other issues. 70 Cal. 136; 79 Cal. 449; 81 Cal. 162.

Findings on allegations not denied are unnecessary. 70 Cal. 226.

An issue on which no evidence is offered need not be found on. 70 Cal. 619.

A finding on a point that could not change the result is unnecessary. 70 Cal. 42.

One desiring a finding on a particular point should request it. 70 Cal. 286.

If the term of a judge expires after an order for judgment, but before findings, the cause must be retried. 70 Cal. 231.

An objection that the findings are not supported by the evidence is not well taken, where the evidence is substantially in conflict. 72 Cal. 598; 72 Cal. 307; 76 Cal. 11; 71 Cal. 618; 73 Cal. 617; 72 Cal. 278; 79 Cal. 633.

A finding as to the absence of false representation held supported by the evidence. 71 Cal. 223.

An objection to findings as not supported by the evidence must be specific. 71 Cal. 223; 76 Cal. 11; 76 Cal. 50; 76 Cal. 103; 81 Cal. 39.

Findings as to the contract of a husband and wife for materials held not supported by evidence. 71 Cal. 380.

Failure to find on an affirmative defense is not cause for a reversal, unless it is shown that some evidence on such defense was submitted. 84 Cal. 272; 84 Cal. 104.

When the facts found sustain the judgment, findings on other issues are unnecessary. 77 Cal. 217.

An objection that the findings are against the preponderance of evidence will not avail. 75 Cal. 513; 77 Cal. 241.

Where there is an absence of findings, they will be presumed to have been waived, unless the contrary appears from a bill of exceptions. 77 Cal. 36; 79 Cal. 501.

A judgment will be reversed for defective or improper findings. 77 Cal. 66.

Findings need not be in the precise language of the pleadings, and may appear under the head of "Conclusions of Law." 81 Cal. 340; 72 Cal. 104; 79 Cal. 493.

Findings how far implied from a judgment. 80 Cal. 365.

Findings, upon issues not in the pleadings will be disregarded. 80 Cal. 348.

Findings of probative facts are sufficient when conclusive of the ultimate facts. 80 Cal. 257; 72 Cal. 598; 78 Cal. 543; 79 Cal. 207; 78 Cal. 543.

A fact not disclosed by the findings must be presumed to have not existed. 80 Cal. 275.

Request for findings are unnecessary and immaterial. 79 Cal. 232.

Facts admitted by the pleadings may be found without evidence. 79 Cal. 283.

Findings are sufficient that cover all material issues. 79 Cal. 297.

Every presumption upon appeal is against error. 79 Cal. 501.

Immaterial issues need not be found on. 78 Cal. 543.

Failure to find on affirmative defenses on which evidence has been submitted is cause for a reversal. 84 Cal. 541.

If the complaint be good, a finding by reference to it is sufficient. 75 Cal. 265.

In the absence of evidence, a finding should be against a party on whom lies the burden of proof. 75 Cal. 293.

An opinion of the trial court is not "findings." 75 Cal. 134.

A finding contrary to what the pleadings admit is erroneous. 75 Cal. 639.

The trial court cannot substitute other findings for those already filed. 75 Cal. 617; 82 Cal. 533.

A finding contrary to the admissions of the pleadings may be disregarded as surplusage. 73 Cal. 564; 75 Cal. 326.

Where there is any evidence tending to support the findings, a reversal will not be ordered on the ground that the findings are not supported by the evidence. 75 Cal. 513; 73 Cal. 617.

Findings which cover all issues will be held sufficient on an appeal from the judgment. 84 Cal. 197.

Findings contrary to the admission of the pleadings cannot support the judgment; such judgment is against law. 82 Cal. 170.

If the court omits to find on a material issue, the judgment cannot be supported. 82 Cal. 170.

When the findings show that the judgment should be for the opposite party, the court will so direct. 82 Cal. 77.

A finding that certain balance became due and owing states merely a conclusion of law. 82 Cal. 502.

A court may, before judgment, modify its findings. 82 Cal. 533.

Failure to appear at the trial is a waiver of findings. 83 Cal. 225.

Issues raised by an answer which constitutes no defense need no findings. 84 Cal. 499.

The judge may prepare the findings himself. 73 Cal. 526.

Specific findings control general findings. 73 Cal. 291.

An objection to the conclusion drawn from the findings cannot be reached by a motion for a new trial; the remedy is by appeal from the judgment. 73 Cal. 561.

Findings as to the value of work held supported by the evidence. 76 Cal. 63.

An objection that a certain finding is not within the issues cannot be first raised on appeal. 72 Cal. 251.

Findings on mere matters of inducement stated in the complaint are wholly unnecessary. 72 Cal. 194.

Findings upon facts admitted by the pleadings are unnecessary. 83 Cal. 593.

Where there are specific findings as to facts, and then a general finding of fact thereon, inconsistent, however, therewith, the special findings must prevail, and a judgment supported by the general finding cannot stand. 83 Cal. 1.

Where the findings do not support the judgment, it will be reversed. 83 Cal. 70.

An attack on the findings as "not supported by the evidence" must specify such fact. Specification by reference to the number of the finding is insufficient. 83 Cal. 296.

Where a fact rests wholly on a presumption, a finding against such presumption is a finding against evidence. 83 Cal. 537.

Erroneous findings on issues not tendered by the pleadings are immaterial. 83 Cal. 589.

A specification that attacks a mere conclusion of law is insufficient. 83 Cal. 296.

Findings are never required as to the facts admitted by the pleadings. 86 Cal. 128.

A judgment will never be reversed for failure to find on immaterial issues. 86 Cal. 128.

The court cannot take judicial notice that a counterclaim had been formerly adjudicated in another action; and a finding based thereon is not supported by any evidence. 86 Cal. 449.

Certain findings as to the adverse use of water held contrary to the evidence. 86 Cal. 1.

A finding as to an issue of fraudulent conveyance held insufficient to support the judgment. 86 Cal. 471.

It is a sufficient finding of fact that the law of another state is the same as the law of this state. 85 Cal. 280.

Under the heading that the decision is against law, the absence of a finding on a material issue may be considered on appeal. 85 Cal. 155.

Failure to find fully upon a material issue is not fatal, if a more complete finding would be adverse to the appellant. 85 Cal. 402.

The party having the burden of proof, and who offers no evidence, cannot be prejudiced by the failure of the court to make findings. 85 Cal. 71.

In equity cases, where the verdict of the jury is in accord with the findings of the court, this sufficiently shows its adoption by the court. 85 Cal. 574.

Findings are unnecessary on such allegations of the complaint as are not denied. 87 Cal. 53.

Findings should cover all material issues raised by the pleadings, but they should be statements of ultimate facts only. 87 Cal. 489.

Where a contract for the sale of land is set out *in hoc verbi* in the complaint, a finding that the vendor entered into the agreement upon terms and conditions set forth in the complaint is a sufficient finding that the vendee executed the contract. 87 Cal. 489.

An allegation that the contract was obtained by fraud is covered by a finding that the contract was not obtained by fraud. 87 Cal. 489.

See **APPEAL; HOMESTEAD; MECHANICS' LIEN; NEGLIGENCE; NEGOTIABLE INSTRUMENT.**

FIRE INSURANCE.

See INSURANCE.

FISH.

The act of March 12, 1885, relative to fraud game is constitutional. 73 Cal. 257.

FIXTURES.

Machinery attached to leased premises by the lessee are fixtures as between him and his creditors, regardless of his right to remove them. 70 Cal. 3.

The removal of fixtures converts them into personal property, for which no demand is necessary before suit. 70 Cal. 3.

A pump affixed to water-works, and planted on the ground, is a fixture under section 660 of the Civil Code. 70 Cal. 3.

An action for damages will lie for the willful removal of fixtures from property mortgaged. 80 Cal. 245.

Soap-making machinery and apparatus attached to a building become part of the realty so as to pass by a deed of the premises. 80 Cal. 245.

It is not clear that partnership fixtures are part of the stock of goods, though part of the stock in trade. 81 Cal. 81.

FORCIBLE ENTRY AND DETAINER.

Essentials for an action of forcible entry. 69 Cal. 562.

A mere trespass does not amount to a forcible entry. 69 Cal. 562.

Actual and peaceable possession by plaintiff at time of entry is essential to an action for forcible entry. 69 Cal. 562.

Certain acts of violence held to constitute forcible entry. 71 Cal. 130.

Tumult or riot is not necessary to constitute forcible entry; a display of force sufficient to intimidate or excite a breach of the peace is sufficient. 71 Cal. 130.

A scrambling possession is not sufficient prior possession to maintain the action. (*Bowers v. Cherokee Boh*, 45 Cal. 498, held not to apply.) 76 Cal. 626.

The question of good faith cuts no figure in the action of forcible entry. 76 Cal. 626.

Under section 1160 of the Code of Civil Procedure, relating to previous actual and peaceable possession for five days next before, fencing or personal presence is not essential to show possession; but there must be exclusive dominion and control. 83 Cal. 96; 77 Cal. 253.

Where the unlawful entry results in the

partial loss of a crop, the defendant is properly held liable therefor. 83 Cal. 96.

Evidence of title or right of possession is inadmissible, as is also the question of good or bad faith. 83 Cal. 96.

FORECLOSURE.

See EXECUTION; JUDGMENT; LIEN; MECHANICS' LIEN; MORTGAGE.

FORGERY.

See CRIMINAL LAW; HUSBAND AND WIFE.

FRANCHISE.

See CORPORATIONS; EMINENT DOMAIN.

FRAUD, AND FRAUDULENT CONVEYANCES.

Orders drawn with intent to defraud creditors are fraudulent as against the assignee of the debtor. 68 Cal. 12.

A transfer for the purpose of defrauding creditors is valid as to all persons except creditors. 70 Cal. 296.

Where the sale of personal property is obtained by fraud, the ownership is not changed, and an action of replevin or conversion lies. 70 Cal. 440.

Rescission for fraud must be made promptly on discovery of the facts. 70 Cal. 250.

In an action to rescind a sale for fraud and for a return of the purchase-money, where such money has been used to satisfy a mortgage, such mortgage will be revived in favor of plaintiff. 70 Cal. 128.

Jurisdiction of equity in cases of fraud where ejectment might lie as to. 71 Cal. 513.

A finding as to bona fide purchase held sustained by the evidence. 71 Cal. 428.

Inadequacy of price held not sufficient notice of the fraud of a grantor. 71 Cal. 428.

Fraud without damage furnishes no ground for action or defense. 83 Cal. 7.

A title voidable because of fraud becomes perfect in the hands of a subsequent grantee for value without notice of the fraud. 71 Cal. 428.

A contract relating to a conveyance held not to be notice of the non-performance of the conditions after the execution of the conveyance. 71 Cal. 428.

A deed of gift executed under great physical and mental weakness, under a false impression as to its nature, should be set aside. 72 Cal. 207.

In the absence of suspicious circumstances, the burden of proof is not on the donee of a gift *crusa mortis* to show that the donor was competent, or the transfer free from fraud. 73 Cal. 614.

Fraudulent intent is one of fact, and not of law. 74 Cal. 540.

A gift from husband to wife when he is financially solvent is not void as to existing creditors. 74 Cal. 540.

The statute of frauds is no bar to relief in cases of constructive trusts. 75 Cal. 527.

When by means of a parol promise made in bad faith a deed is secured, it is a case of actual fraud. 75 Cal. 525.

A deed obtained by one who stands in confidential relationship, under a parol promise, which has been afterwards violated, constitutes a cause of constructive fraud. 75 Cal. 527.

The relationship of husband and wife is confidential. 75 Cal. 527.

The relationship of a managing agent and his corporation is confidential. 86 Cal. 623.

An assignee in insolvency is not compelled to reimburse a fraudulent transferee of the debtor before being entitled to a recovery of the goods. 75 Cal. 536.

A complaint in a suit to enjoin an execution alleged to be permitted for the purpose of defrauding creditors held insufficient. 82 Cal. 170.

Certain representations made by a landlord held not fraudulent because matters of opinion. A fraudulent representation as to the number of acres rented may be a proper counterclaim against the rent. 83 Cal. 7.

A finding that a deed by a debtor was executed without consideration is not equivalent to an averment that it was made to hinder or defraud creditors. 83 Cal. 368.

If a marriage is brought about by a fraudulent contrivance and promise as to conveyance of property, a court of equity will decree a conveyance. 77 Cal. 106.

A mere promise to a mother on her deathbed creates only a moral obligation. 77 Cal. 106.

The fact that a portion of the purchase-money was paid by a third person may create a trust in the property *pro tanto*, but cannot be the consideration for a deed to such person or his heir. 77 Cal. 106.

A conveyance to defraud cannot be set aside unless the grantee had notice of the fraud, and purchased without consideration. 77 Cal. 218.

Allegations of fraud must set up the facts constituting it. 77 Cal. 408.

The fact that the fraudulent consideration was verbal, and the contract written, will not bar the court of equity from granting relief. 77 Cal. 22.

A promise made without any intent to perform is a fraud, and if it has induced a

party to alter his position to his injury, is ground for relief in equity. 77 Cal. 22.

Complaint for rescission on the ground of undue influence and fraud held sufficient. 77 Cal. 596.

Both courts of law and equity have jurisdiction in many cases of fraud. 71 Cal. 429.

A person who seeks to rescind for fraud must act promptly after its discovery. 75 Cal. 389.

In what cases a suit for damages, and not for rescission, lies. 78 Cal. 389.

Return of consideration not necessary for rescission, where the value thereof has been fully had. 77 Cal. 596.

Tender of the precise consideration is essential as a condition of rescission; the parties must be placed *in statu quo*, else there can be no rescission. 78 Cal. 389. But see 77 Cal. 596.

Before a party is entitled to rescind, he must show some damages. 78 Cal. 389.

Fraudulent representation as the basis of rescission must be as to a material fact, not a mere opinion or statement of intention. The statement must be relied upon as an inducement to execute the contract or conveyance. 78 Cal. 126.

A promissory note obtained through false representation may be avoided, notwithstanding the fact that the maker might have discovered the real facts before its execution had he exercised a higher degree of care or diligence. 78 Cal. 221.

Complaint by creditors to set aside a judgment by confession held insufficient in not alleging that the debt was not justly due. 79 Cal. 594.

There can be no fraud in the pursuance of a remedy allowed by law. 79 Cal. 594.

A certain complaint attempting to charge fraud and collusion in foreclosure proceedings held insufficient. 83 Cal. 477.

A deed in fraud of creditors is absolutely void against them, and an execution sale thereafter of the debtor's interest conveys the legal right. 84 Cal. 505.

The question of fraud is one of fact as to intent, and where there is no consideration, the intent of the vendee is immaterial. 84 Cal. 505.

Parties to a fraudulent scheme by which property has been acquired will not be relieved against each other in equity. 84 Cal. 409.

A case in which process could not be sued against a defendant found guilty of fraud in a matter of composition with creditors. 84 Cal. 98.

A reckless, unwarranted assertion as to the soundness of a horse, made without intentional falsehood, held to yet constitute actual fraud. 84 Cal. 646.

A deed to land to which the grantor had no title cannot be set aside at the instance of creditors. 80 Cal. 65.

A complaint to set aside a judgment because through the negligence, fraud, and mistake of his attorney, plaintiff had lost the right to appeal, held bad. 81 Cal. 627.

"Deceit without injury" held not cause for relief on the ground of fraud. 82 Cal. 64.

The fact that a debtor in insolvency understated his indebtedness by mistake and inadvertence sufficiently shows lack of fraudulent intent. 85 Cal. 76.

A judgment declaring a certain mortgage fraudulent is not admissible against a mortgagee who is not a party to the suit. 85 Cal. 542.

When the consent of a purchaser is procured by fraudulent misrepresentation as to the value of the land, knowingly made by the vendor, and which consent would not have been given but for such fraud, there is no valid and binding contract between the parties. 85 Cal. 11.

Evidence held not to show confidential relationship. 82 Cal. 64.

A complaint which fails to show that the plaintiff was actually misled by the fraudulent misrepresentation held bad. 69 Cal. 536.

Where the alleged fraudulent representation is claimed to have been made by the agent of the vendor, and the vendee has means of knowledge as to the fact, and there is a conflict as to whether such representations were made, a finding that there was no fraud will not be disturbed on appeal. 87 Cal. 532.

A rescission on the ground of fraud must be made with reasonable promptness. 87 Cal. 532.

Where an answer alleges fraud in general terms, and no demurrer is filed thereto, it is too late to raise the objection on appeal that the particular facts constituting the fraud are not set up. 87 Cal. 399.

Where the facts are such that the jury would be satisfied in inferring fraud in the transfer, the party alleging fraud is entitled to instructions fully stating the law applicable to fraudulent transfers. 87 Cal. 399.

An instruction that a transfer to one creditor in preference to another is not necessarily fraudulent should be qualified by the statement that the transfer must be made in good faith. 87 Cal. 399.

It is error to refuse an instruction that a man is guilty of a fraud in giving what the law deems fraudulent. 87 Cal. 399.

Where the property transferred to a creditor by an insolvent debtor is largely in excess of the amount of the indebtedness, it is a circumstance tending to prove fraud. So, also, is an agreement that the creditor would refund the surplus proceeds. 87 Cal. 399.

The measure of damages for fraudulent representations inducing the purchase of land is the difference between the price paid

by reason of such representations and the actual value. 87 Cal. 557.

Fraudulent imposition upon the land department cannot be set up as a defense to an action in ejectment brought up by the patentee. . . . The patent can only be assailed on these grounds by a proceeding in equity. 87 Cal. 371.

A conveyance by an agent to himself and wife for a nominal consideration is a fraud on the principal, and a nullity. 87 Cal. 256.

See AGENCY; BONA FIDE PURCHASER; CONTRACTS; DAMAGES; DEBTOR AND CREDITOR; DEED; EQUITY; FALSE REPRESENTATION; GIFT; INJUNCTION SALE; SPIRITUALISM.

FUNERAL EXPENSES.

See PROBATE LAW.

GAMBLING-HOUSE.

See CRIMINAL LAW.

GAME-LAWS.

See FISH.

GAMING.

See CRIMINAL LAW.

GARNISHMENT.

See ATTACHMENT.

GAS INSPECTOR.

See PUBLIC OFFICERS.

GIFT.

Validity of gift *causa mortis* discussed. 73 Cal. 614.

A parol gift of land held void under the statute of frauds. 73 Cal. 415.

The giver has the right to regulate the disposal and to designate the donee. 83 Cal. 322.

Section 31, article 4, of constitution, construed as to gift by the state. 83 Cal. 264.

It is essential to a gift *causa mortis* that the donor part with both possession and control. 75 Cal. 548; 64 Cal. 346.

The legislature has no power to make gifts to its employees under the pretense of "extra compensation." 77 Cal. 473.

When a husband who is solvent openly gives his wife personal property, and she takes and keeps possession, the fact that he afterwards uses the property will not cause the transfer to be void as to his creditors. 81 Cal. 93; 82 Cal. 219.

See FRAUD, AND FRAUDULENT CONVEYANCES;
STATUTE OF FRAUDS.

GOLDEN GATE PARK.

See NUISANCE.

GOODS SOLD AND DELIVERED.

See PLEADINGS.

GOOD-WILL.

See WARRANTY.

GOVERNMENT LANDS.

See MINING CLAIMS; PUBLIC LAND.

GRANDCHILDREN.

See PROBATE LAW; SUCCESSION; WILLS.

GRAND JURIES.

Indictments by an illegal grand jury are void. 69 Cal. 105.

Mode adopted in filling panel in a grand jury held valid. 69 Cal. 105.

Invalidity of grand jury cannot avail as a defense for contempt for refusing to testify before it. 69 Cal. 541.

Terms of court, how abolished by the constitution of 1879. 69 Cal. 541.

A grand juror must testify as to what persons were examined before him, and for refusal may be punished for contempt. 71 Cal. 212.

GRAND LARCENY.

See CRIMINAL LAW.

GRANT.

See DEED; MEXICAN GRANT.

GROWING CROPS.

A chattel mortgage on growing crops is not invalidated by a tortious removal. 70 Cal. 196.

Possession of growing crops held not to be under any contract of lease on shares. 74 Cal. 376.

A lease of land to raise a crop on shares makes the parties tenants in common, and the rights of the lessor may be enforced by a partition suit and the appointment of a receiver. 75 Cal. 319.

The lien of a mortgage on growing crops is not lost by the mortgagee permitting the mortgagor to store the crop in a warehouse under an agreement that it should be stored in the name of the mortgagee, although the warehouseman stored it in the name of the mortgagor. 87 Cal. 566.

Contracts for sale of growing crops need not be in writing, and are not within the statute of frauds. 77 Cal. 239.

See MORTGAGES; PARTITION; PARTNERSHIP;
SALES.

GURANTY.

Whether a promise to pay for supplies furnished a corporation was one of guaranty or an original promise, is a question of fact. In such case if any credit was given to the corporation, or if it was treated as in any degree liable; the promise can only be regarded as a guaranty. 81 Cal. 280.

Where the defendant is sued in *assumpsit* merely, he need not plead that he was a mere guarantor, and that his contract was void. 81 Cal. 280.

See STATUTE OF FRAUDS; SURETY.

GUARDIAN AD LITEM.

Where the guardian *ad litem* is not appointed until the trial, the proceedings are not therefore void. 74 Cal. 52.

The provisions relating to guardian *ad litem* do not apply to probate proceedings. The provisions of probate law in relation to the appointment of attorneys govern the matter. 75 Cal. 596.

Proceedings relating to the appointment of a guardian *ad litem* form no part of the judgment roll. 79 Cal. 266.

GUARDIAN AND WARD.

In a proceeding against a guardian for accounting, services of citation may be made by publication. 68 Cal. 82.

Appointment of guardian, notice to relations under statutes in force in May, 1866. 70 Cal. 362.

The superior court, where the minor is an inhabitant of the county, has jurisdiction to appoint a guardian for him. 74 Cal. 421.

A minor who resides for three years in a county becomes an inhabitant thereof for all purposes of jurisdiction. 74 Cal. 421.

When a guardian has been appointed by will or deed, the superior court has no jurisdiction to appoint one. 84 Cal. 592.

An order illegally requiring a guardian to pay for the maintenance of his ward is appealable. 84 Cal. 592.

The court has no power to dispense with the guardian's bonds. 84 Cal. 592.

A "guardian appointed by deed" must be considered as a testamentary guardian. 84 Cal. 592.

An order regular on its face appointing a guardian cannot be collaterally attacked for fraud, collusion, or other matters *aliunde*. 75 Cal. 642.

A guardian, under the act of 1861, may sell the land of his ward necessary for a railroad. 75 Cal. 642.

The appearance of a general guardian for a defendant gives the court jurisdiction over the ward. 80 Cal. 491.

A return of personal service on a minor under fourteen and on his guardian shows sufficient service on the minor. 80 Cal. 491.

Guardians have authority under section 795 of the Code of Civil Procedure to consent to partition after action has been begun. 80 Cal. 490.

Sales by guardians, when and how authorized. 83 Cal. 344.

Petitions and proceedings for guardian's sale of property. 83 Cal. 344.

Items in a guardian's account for the payment for the board of his wards held properly disallowed. 85 Cal. 98.

A guardian who has collected the moneys of his wards, which he has used for his own purpose, and rendered no account for many years, is chargeable with compound interest upon the money. 85 Cal. 98.

An action on a promissory note made by an insane person cannot be maintained against his guardian. 87 Cal. 530.

The summons in an action against an incompetent person must be served upon both him and his guardian. It is the duty of such guardian to defend the action, and the court may also appoint a guardian *ad litem*. 87 Cal. 530.

The provisions of the code authorizing the court to restore a person adjudged insane is only applicable to those for whom guardians have been appointed. 87 Cal. 192.

See INSANE PERSONS.

HABEAS CORPUS.

A rehearing in supreme court on *habeas corpus* is not permissible. 71 Cal. 608.

Refusal in open court to pay alimony is punishable summarily. 71 Cal. 608.

Mere errors of law before conviction cannot be reviewed on *habeas corpus*. 72 Cal. 53; 73 Cal. 365.

A party imprisoned for contempt for a failure to pay alimony after filing a petition in insolvency will not be released on *habeas corpus*. 73 Cal. 97.

Failure of a judgment of conviction to recite the date of the offense will not entitle the defendant to a discharge on *habeas corpus*. 75 Cal. 226.

Habeas corpus does not extend beyond an inquiry into jurisdiction and the validity of the process on its face. 79 Cal. 584; 77 Cal. 156.

The sufficiency of a complaint or indictment, or of the evidence, cannot generally be entered into on *habeas corpus*. 77 Cal. 164. *Per contra*, 82 Cal. 245.

A person convicted of felony cannot on *habeas corpus* raise the point that he was not examined before a magistrate. 83 Cal. 558.

A commitment on a judgment on conviction of misdemeanor need not, as against *habeas corpus*, recite matters showing regularity of proceedings. 83 Cal. 620.

Conclusiveness of findings in divorce proceedings as to the defendant's ability to pay alimony. 83 Cal. 460.

A petition for *habeas corpus* must be verified, alleging the facts constituting the illegal imprisonment. 84 Cal. 584.

If the petition is based on a commitment without probable cause, it must set out the evidence taken. 84 Cal. 584.

The facts stated in a judgment of conviction for contempt are conclusive against *habeas corpus*. 84 Cal. 50.

A prisoner confined after his term of imprisonment in the state prison, but held for the purpose of collecting a fine, also part of the penalty, will be discharged on *habeas corpus*. 78 Cal. 304.

A defendant rearrested and held for the same crime will not be discharged on *habeas corpus*, where the evidence in both cases was not the same. 79 Cal. 554.

The recitals in a warrant of arrest from the governor in cases of extradition will be presumed true in *habeas corpus* proceedings. 79 Cal. 195.

A judgment for imprisonment for contempt does not justify the punishment of hard labor, and from this a defendant will be released on *habeas corpus*. 80 Cal. 201.

A warrant merely defective in form, in not showing the name of the injured party is valid as against *habeas corpus*. 85 Cal. 309.

A commitment for an offense, other than that shown by the depositions taken on the commitment, is valid as against *habeas corpus*, if such deposition shows the commission of any offense. 85 Cal. 309.

A commitment upon a re-examination

without the filing of a new complaint is valid as against *habeas corpus*. 85 Cal. 362.

The fact that a prisoner, while serving a sentence, was brought out of prison to be tried for murder under the order of the superior court, other than that from which he was sentenced, cannot warrant his discharge on *habeas corpus*. 85 Cal. 203.

Evidence against a person held to answer held sufficient as against a discharge on *habeas corpus*. 86 Cal. 631; 86 Cal. 402.

A party charged with a felony on a complaint sworn to on mere information and belief will be discharged on *habeas corpus*. 74 Cal. 165.

A mere omission of the date of the offense in a complaint before a police court will not entitle the accused to a discharge on *habeas corpus*. 87 Cal. 423.

Where the record is silent as to the age of a person, the superior court will be presumed to have acted correctly in sentencing the prisoner to the house of correction. 87 Cal. 78.

A person committed to an insane asylum can only be discharged or restored to capacity by the officers of the asylum, or upon a writ of *habeas corpus*. In such proceeding, the order of commitment is not conclusive of the plaintiff's insanity. 87 Cal. 192.

Where a complaint states facts which show a violation of both the city ordinance and the Penal Code, and both are within the jurisdiction of the justice's court, and the judgment is within the limits prescribed by the statute, the defendant will not be discharged on *habeas corpus*. 87 Cal. 91.

On a hearing in *habeas corpus*, where the defendant claims to have been held for a crime without "probable cause," it is the duty of the court to inquire into the question of probable cause, notwithstanding the filing of an information; and in such case the petitioner may produce evidence in support of his allegation. 82 Cal. 246.

The district attorney is merely a ministerial officer, and a filing of an information by him does not alter the *status* of a case, as would a formal indictment. (Citing 110 U. S. 553.) 82 Cal. 246.

An officer cannot be legally held for kidnapping, where he was regularly acting in his official capacity in executing a proper warrant of arrest. 82 Cal. 249.

See CONTEMPT; CRIMINAL LAW.

HARBOR COMMISSIONERS.

The state harbor commissioners may be enjoined from erecting a wharf upon a water lot that is private property. 79 Cal. 540.

The board of harbor commissioners may appoint and remove wharfingers and collectors. 81 Cal. 19.

HASTINGS LAW COLLEGE.

The legislature cannot change the form of government of Hastings Law College. 69 Cal. 215.

HIGHWAYS.

Mandamus lies to compel water or canal corporations to erect bridges across the public highway. 68 Cal. 359.

The owner of land bordering on a street is presumed to own to the middle of the way, subject only to an easement, and he may maintain ejectment therefor against a street-railway. 69 Cal. 202. But see 87 Cal. 597.

Dedication of land for highways, proof of. 70 Cal. 476; 70 Cal. 451.

Proceedings to condemn land for, prerequisites of. 70 Cal. 431.

Correction of surveys for, how made. 71 Cal. 400.

Proceedings to alter. 71 Cal. 400.

Right of road overseer to bring actions for obstructions to. 71 Cal. 34.

Description of highway in complaint for removal of obstructions. 71 Cal. 34.

Abandonment or adverse possession of, is shown by cultivation and farming use. 71 Cal. 21.

In action to restrain a road overseer from opening a road, evidence of owner's admissions may be followed by evidence of his denials. 71 Cal. 149.

Holder of certificate for school-land may dedicate a portion for a public highway. 71 Cal. 21.

No right to obstruct a street can be secured by prescription. 87 Cal. 597.

An ordinance against obstructing the streets held valid. 87 Cal. 91.

Town lots sold by map showing streets, as proof of dedication. 72 Cal. 170.

Land dedicated to public use cannot be acquired by adverse possession. 72 Cal. 170.

Petition for construction of public road need not allege that petitioners are freeholders. 75 Cal. 604.

Notice under section 2685 of the Political Code need not be in writing. 75 Cal. 604.

Duty of viewfers. 75 Cal. 604.

Discretion of supervisors as to width of road. 75 Cal. 604.

Road overseers have no authority to sue for obstructions until after the highway is laid out or completed. 77 Cal. 16.

Suit to remove obstructions, findings in. 78 Cal. 9.

Dedication of highway by user and consent must continue for five years. 78 Cal. 9.

Butte County road-law act of 1874 construed. 81 Cal. 122.

The act of Congress of 1866 granted the right of way for highways over all public land not reserved. Patents are taken subject to such easements. 81 Cal. 122.

Highways may be extinguished by order of supervisors, or by operation of law. A highway acquired by five years' user, may be extinguished by five years' non-user. 81 Cal. 122.

An offer of dedication must be accepted by the public authorities, either by user or by some formal act. 86 Cal. 405.

An offer to dedicate must be accepted within a reasonable time, and if not so accepted, may be withdrawn. 83 Cal. 623.

The question of the dedication of a street is one of intention, shown by the act of the owner. 86 Cal. 192.

Proceedings to open a public highway must be strictly followed and construed. 82 Cal. 153.

Gate maintained across a road is strong evidence in rebuttal of evidence of public dedication. 82 Cal. 153.

When a trespass by a road overseer would be probably repeated, he may be enjoined. 80 Cal. 153.

The platting of land with lots and streets does not of itself amount to a dedication. The question of dedication is purely one of intent, and must be shown to have been actually consummated. 82 Cal. 24.

Dedication and abandonment. 83 Cal. 623.

See **STREETS**.

HOMESTEAD.

Actual residence on premises necessary to constitute. 71 Cal. 300; 68 Cal. 572.

Residence not provable by common repute. 65 Cal. 572.

Statement of value in declaration held sufficient. 68 Cal. 134.

Homestead declaration as evidence to avoid an alleged trust deed. 68 Cal. 135.

Absolute title to, in surviving wife. 80 Cal. 206; 79 Cal. 7; 78 Cal. 470; 68 Cal. 374.

Actual residence of the claimant for one day without his family held sufficient. 69 Cal. 195.

May be set apart to insolvent, though the debtor never resided thereon. 69 Cal. 244.

Any interest in the premises resided on is sufficient as the basis of a homestead. 70 Cal. 236.

Homestead valid in part and invalid in part. 71 Cal. 305; 70 Cal. 236.

"Estimate of value" may be seven thousand dollars. 70 Cal. 236.

Mechanic's lien, under section 1241 of the Civil Code, did not attach for materials. 70 Cal. 187.

Mechanics' liens may now attach to, for material. 74 Cal. 356.

Act of April 23, 1860, construed. 71 Cal. 273; 71 Cal. 325.

Prior to March 9, 1868, homesteads could not be acquired on land held in joint tenancy. 71 Cal. 504.

The wife is a necessary party in a suit to foreclose a mortgage on premises homesteaded after such mortgage. 71 Cal. 479.

Water-ditch appurtenant to a homestead is exempt from execution. 72 Cal. 477.

Homestead held not fraudulent as to creditors. 72 Cal. 363.

A husband, after divorce, may deed to his ex-wife his interest in their homestead property. 73 Cal. 271.

The sale and surrender of a homestead under an execution is not valid against it. 74 Cal. 266.

A second homestead cannot be created while the first is in force. 74 Cal. 266.

A homestead interest is sufficient on which to found a suit to quiet title. 74 Cal. 614.

A lot part of which is rented out can only be homesteaded as to the part actually occupied as a residence. 75 Cal. 422.

An order in a proceeding to appraise the homestead is not appealable as a special order made after final judgment. 75 Cal. 163.

Proceedings in appraisement, how conducted. 75 Cal. 163.

A suit against an executrix to foreclose a mortgage on her homestead cannot affect her personal interest therein. 75 Cal. 332.

Dedication of homestead selected from separate property of wife must be strictly construed. 76 Cal. 527.

Homestead selected from separate property of wife belongs two thirds to her children and one third to her husband, in case of her dying intestate. 76 Cal. 527.

Community property, rights of survivor. 76 Cal. 639.

Sufficiency of statement of value. 78 Cal. 504; 76 Cal. 524.

Homestead statutes should be liberally construed. 76 Cal. 524; 78 Cal. 504.

A description sufficient for a deed is sufficient for a homestead. 76 Cal. 524.

Homesteads may include land adjoining the dwelling, and used in connection therewith. 76 Cal. 315.

In insolvency of the husband, a mortgagee of the homestead need not present his claim as prerequisite to a suit for foreclosure against husband and wife. 76 Cal. 229.

The failure of a recorder to index a homestead, his fees being paid, does not invalidate it. 78 Cal. 504.

Certificate of acknowledgment of, held sufficient. 78 Cal. 504.

After a homestead has been declared, the husband may convey his interest therein to his wife. Thereafter such homestead remains valid as on the separate property of the wife. 78 Cal. 310.

If the homestead is on the separate property of the wife, divorce restores to her the title in fee. 78 Cal. 310.

Rights of survivorship are governed by

the law as it exists when death occurs. 78 Cal. 470.

In contests as to validity of homesteads, the principal use to which the property is put is a test of its validity. 78 Cal. 293.

No action to foreclose a mortgage on the homestead of a decedent can be brought or prosecuted unless the claim be first presented to the executor or administrator. 79 Cal. 7.

A declaration of a homestead by the wife may be made without the joining of her husband therein, and need not be filed for record by herself in person. 79 Cal. 205.

Admissions made by wife in declaring a homestead, that the premises were the separate estate of her husband, are evidence against her. 79 Cal. 304.

What premises constitute a homestead; appraisement under execution. 79 Cal. 608; 79 Cal. 460.

Declarations of homestead do not create any new title. 79 Cal. 55.

Disposition of homestead property on divorce. 80 Cal. 237.

A deed for homestead property signed by husband alone is invalid. 81 Cal. 217.

Law subjecting homesteads to material-men's liens is constitutional. 81 Cal. 641.

The test of the validity of a homestead claim is the use made of it at the time of filing; the subsequent use or disuse of any part of the premises cuts no figure. 82 Cal. 226.

A homestead can only be extinguished or abandoned as provided in sections 1242 and 1243 of the Civil Code. 82 Cal. 226.

A declaration of homestead under the act of 1850 must allege the residence of declarant and family on the premises. 83 Cal. 23.

Findings on a plea of homestead held sufficient. 83 Cal. 319.

Necessary fencing as an element in damages for condemnation of a roadway. 85 Cal. 637.

When a homestead is carved out of the separate estate of the husband, and thereafter they jointly mortgage the same, and the husband subsequently dies, and the creditor does not present his claim in due time against the estate, the mortgage cannot be foreclosed, even as against the wife. 85 Cal. 55.

A homestead carved out of the separate property of a decedent can only be set apart to the widow for a limited time. 85 Cal. 619.

Proceedings in insolvency relative to setting apart a homestead. 85 Cal. 71; 85 Cal. 76; 85 Cal. 549.

A mortgage given by the widow on a homestead executed under mutual mistake as to her liability is without consideration, and invalid. 85 Cal. 610.

A will disposing of real property is sub-

ject to the power of the court to set the same apart to the surviving husband or wife as a homestead. 86 Cal. 151.

A homestead out of the community property upon the death of one of the spouses becomes the sole property of the survivor, and continues to retain its homestead character. 86 Cal. 119.

Property on which a homestead has been filed, no matter what its value, is exempt from seizure and forced sale. A levy of execution upon such property creates no lien. 86 Cal. 119.

A homestead does not lose its character because the claimant has ceased to be the head of a family, owing to the death of his mother. 86 Cal. 134.

An injunction against the sale of a homestead will not be refused on the ground that the sale would be invalid, or that a remedy might be obtained by applying to the court which issued the execution. 86 Cal. 134.

Where no homestead has been selected by a decedent, the court should set apart a homestead for the surviving spouse out of the community property, if there is any, and if not, then for a limited period out of the separate property. 86 Cal. 151.

A homestead acquired under the act of 1852 vests in the survivor by descent on the death of either spouse, and need not be set apart by the probate court. 87 Cal. 329.

The title to a homestead rests absolutely in survivor. A mortgage claim against the homestead must be presented in time, to an estate, or it is barred. 83 Cal. 440.

A wife's declaration on the separate property of her husband does not affect the title of his heirs, except that the same may be set apart for a limited time to the widow. 82 Cal. 7.

A deed from husband to his wife three years before his insolvency, and a subsequent homestead declaration by her on the premises, are not evidence in a contest to prevent his discharge. 82 Cal. 219.

See DIVORCE; HOMESTEAD; INSOLVENCY;
PROBATE LAW; SUCCESSION.

HOMESTEAD (FEDERAL).

See PUBLIC LAND.

HOMICIDE.

See CRIMINAL LAW.

HOUSE OF CORRECTION.

See CRIMINAL LAW.

HUSBAND AND WIFE.

A complaint for the value of necessities furnished a wife under sections 174 and 175 of the Civil Code held sufficient. 69 Cal. 521.

Property purchased by a married woman is presumed to be community property. 70 Cal. 282.

Property purchased by a married woman, partly with her separate fund and partly with money borrowed by her, is mixed property. 70 Cal. 282; 79 Cal. 304.

In a divorce suit, the court may refuse to proceed until the defendant has paid counsel fees previously ordered. 70 Cal. 295.

When the husband appeals from a decree of divorce, the court may order him to pay additional counsel fees for the appeal. 70 Cal. 291.

An offer to prove that a man and woman lived as husband and wife is not an offer to prove marriage. 70 Cal. 560.

Evidence held sufficient to show joint liability of husband and wife. 74 Cal. 530.

Power of surviving husband under the act of 1850. 75 Cal. 134.

On the death of the husband, one half the community property goes to his wife, and upon the death of the wife, the entire community property goes to the husband. 79 Cal. 334; 75 Cal. 619.

Presumption as to survivorship where husband and wife perish in the same calamity. 76 Cal. 649.

A married woman living separate from her husband, because of his desertion, may sue alone for personal injuries. 77 Cal. 390.

A lease of real property from a married woman must be acknowledged. 77 Cal. 89.

A communication from a husband to his wife is not slander. 78 Cal. 486.

He who claims that property acquired during marriage is not community property must prove it so to be by clear and satisfactory evidence. 78 Cal. 58; 79 Cal. 304.

What is shown to have been separate property remains such, and the profits thereof acquire the same character; but where the funds are commingled, the profits are community property. 79 Cal. 304.

A deed from a husband to his wife, "to have and to hold to her separate use," makes the property presumptively hers. 79 Cal. 463.

The earnings of the wife while separated from her husband are her separate property. 79 Cal. 203.

The law of ostensible agency applies to the wife who permits her husband to contract for her. 79 Cal. 55.

The occupant of a town site is the owner, and the property does not become community because one of the spouses advanced the funds to get a conveyance from the municipal authorities. 83 Cal. 317.

If a husband abandons all claims to a wife's

earnings, and with such earnings she buys real property, it is her separate property. 81 Cal. 261.

Where a husband and wife jointly conduct a business upon a capital nine hundred dollars of which belongs to the wife and twenty dollars to the husband, and upon the husband's death the value of the stock was less than nine hundred dollars, her original capital is sufficiently traced to keep it impressed with the character of her separate property. 81 Cal. 101.

An agreement for separation and a division of the community property followed by an inventory duly recorded held binding against the creditors of the husband. 83 Cal. 274.

Every one is bound to take notice that property conveyed to a married woman may be her separate property in whole or in part. Section 164 of the Civil Code construed. 83 Cal. 521.

A husband out of debt may, by way of gift, cause property to be conveyed to his wife. 83 Cal. 521.

A contract by a married woman to convey real property is invalid, unless duly acknowledged. 83 Cal. 521.

Where a husband and wife jointly agree to sell joint property, the husband cannot be compelled to transfer his individual interest on refusal of his wife to join in the conveyance. 83 Cal. 521.

If the premises are the separate property of the husband, the genuineness of the wife's signature to the conveyance is immaterial. 83 Cal. 23.

A husband and wife are in law but one person, and cannot be prosecuted for a conspiracy between them alone. 82 Cal. 107.

A deed of gift to a wife from the husband, of property on which she afterwards files a homestead, is not evidence of fraud as to creditors. 82 Cal. 219.

An action for divorce is based on a breach of contract, and when a cross-complaint is filed, the suit cannot be dismissed against the consent of the defendant. 82 Cal. 413.

In a suit of ejectment against a wife by an execution creditor of her husband, where she by cross-complaint asks that her title thereto be quieted, claiming the same as her separate property, a mere conflict between a general and special finding as to the date of her marriage will be disregarded. 85 Cal. 574.

The husband has the entire control of the community property, and may mortgage it without the consent of his wife, although the deed was taken in her name. 85 Cal. 280.

If a husband loans money to his wife to purchase property, with the intention that the same should be her separate property, he obtains no interest in the land. 86 Cal. 286.

Money raised by a mortgage on the sepa-

rate property of the wife belongs to her alone. 86 Cal. 286.

In dealings between husband and wife, where one advances money for the other, the intention of the parties is of paramount importance in deciding as to the ownership of the property acquired. 86 Cal. 286.

The right to recover damages for a personal injury, if acquired by the wife during marriage, is community property. 87 Cal. 464.

In a suit for damages by the wife, the contributory negligence of her husband will prevent a recovery by her for the injury sustained by the negligence of a third party. 87 Cal. 464.

The term "marriage contract," as used in section 1299 of the Civil Code, concerning the revocation of a will by the act of marriage, refers only to such contracts as expressly purports to be a marriage contract. It does not include a post-nuptial agreement. 87 Cal. 645.

See ACKNOWLEDGMENT; CERTIFICATE; DIVORCE; ELECTIONS; GIFT; HOMESTEAD; MARRIAGE; PROBATE LAW; SLANDER; WILLS.

IMMIGRATION COMMISSIONERS.

See PUBLIC OFFICERS.

IMPEACHMENT.

See EVIDENCE.

INCLOSURE.

See FORCIBLE ENTRY AND DETAINER.

INDECENT EXPOSURE.

See CRIMINAL LAW.

INDEMNITY.

See ATTACHMENT; BOND.

INDEMNITY LANDS.

See PUBLIC LANDS.

INDIANS.

See CRIMINAL LAW; MEXICAN GRANT; PUBLIC LANDS.

INDIGENT PERSONS.

See APPROPRIATION.

INDORSEMENT.

See NEGOTIABLE INSTRUMENT.

INFANTS.

See GUARDIAN AD LITEM; GUARDIAN AND WARD; NEGLIGENCE; PARENT AND CHILD.

INFLUENCING COURTS.

See CONTEMPT.

INFORMATION.

See CRIMINAL LAW; HABEAS CORPUS.

INHABITANT.

See GUARDIAN AND WARD.

INJUNCTION.

Legal proceedings will not be restrained by injunction, where the defense has been lost through negligence. 68 Cal. 210.

Where a proper defense at law could not be made, or was prevented by fraudulent conduct, an injunction will lie. 68 Cal. 210.

Injunctions will be granted to restrain the wrongful diversion of water without assessment of actual damages. 68 Cal. 146.

A sale under a judgment not against the plaintiff or his grantor cannot be enjoined. 69 Cal. 586. See 70 Cal. 85.

An injunction *pendente lite* supercedes a previous restraining order. 70 Cal. 85.

A married woman is entitled to an injunction to restrain a sale in a suit against her husband of property purchased with her separate funds during coverture. 70 Cal. 242.

In a suit in ejectment, the defendant filed a cross-complaint asking that plaintiff be ordered enjoined from prosecuting the suit on the ground that it was vexatious and unnecessary litigation. The court granted the order. Held, that the order was erroneous. 70 Cal. 423.

Injunction will not lie at suit of a taxpayer to restrain a board of supervisors from allowing and paying certain claims alleged to be illegal. 72 Cal. 517.

An *ex parte* injunction cannot be dissolved on the ground that the matter has been abated, without service of notice on the plaintiff. 72 Cal. 270.

Injunction will not lie to restrain execution on a justice's court judgment which is void on its face. The remedy is by motion to set aside the execution. 73 Cal. 3.

An injunction will not lie to restrain the board of supervisors from giving the notice required by section 3981 of the Penal Code, as to removal of county seat, on the ground that the election was illegal. 75 Cal. 179.

Injunction should be granted *pendente lite* in a suit of ejectment, where the complaint shows irreparable waste. Doubt as to title is not sufficient ground for reversal. 75 Cal. 620.

Before equity will restrain a trespass, the facts must be set up showing irreparable injury. It is not sufficient to merely so allege. 75 Cal. 601.

A justice's judgment by default will not be restrained where there is no lack of jurisdiction. 75 Cal. 230.

A trespass will not be restrained on the ground that the trespasser is insolvent. 75 Cal. 601.

A person who claims to own a mine, but who has never worked it, or threatened to work it, cannot be enjoined from working it. 75 Cal. 78.

The sale of delinquent stock will not be enjoined on the ground of insufficiency of notice of sale, if the stockholder has never offered to pay his assessments. 76 Cal. 26.

A complaint for an injunction to restrain irreparable injury need not aver the insolvency of defendant. 77 Cal. 286. See 75 Cal. 601.

On an appeal from an order dissolving an injunction, the supreme court cannot order a stay of proceedings in an action on the bond. 77 Cal. 483.

The fact that there exists a remedy by motion will not prevent the issuance of an execution against an illegal execution. 86 Cal. 134.

The mere insolvency of a trespasser will not justify an injunction. 75 Cal. 601.

The state courts have concurrent jurisdiction with the federal courts in action relative to preventing the removal of moorings in navigable waters. 77 Cal. 286.

Injunction bonds, construction of, and proceedings upon. 78 Cal. 118.

The business of hydraulic mining is not *per se* unlawful, and the sale of water cannot be enjoined merely because it is to be used in hydraulic mining. A party furnishing materials to another, to be used in a lawful business, cannot be enjoined on the ground that the business is to be conducted so as to injure others. 79 Cal. 239.

In an action on an injunction bond given

in the federal courts, but sued on in the state courts, counsel fees may be included as part of the damages, though not allowable in the federal courts. 79 Cal. 301.

The allowance of counsel fees as damages is exceptional, and should not be carried beyond the point to which former decisions have taken it. 79 Cal. 301.

The court may dissolve an injunction for insufficiency of the bond. 80 Cal. 611.

The profits of a business lost by means of an injunction are properly allowed as damages in a suit on the bond. 80 Cal. 611.

Damages occurring after a final injunction decree are not recoverable on the bond, though such decree is reversed on appeal. 80 Cal. 611.

A mandatory injunction cannot require the defendant to do an act that would render him liable to others not parties to the suit. 81 Cal. 64.

A written instrument in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury, may be adjudged void, and ordered to be delivered up or canceled. 83 Cal. 234.

The superior court cannot enjoin the execution of a mandate of the supreme court. 83 Cal. 384.

Case in which defendant may have an execution enjoined. 68 Cal. 211; 68 Cal. 369; 71 Cal. 156.

Injunction to prevent the use of a forged marriage contract. 84 Cal. 424.

In a suit on an injunction bond, the complaint must aver the non-payment of the money claimed. 84 Cal. 216.

Injunction against road overseers and supervisors for trespass and waste. 84 Cal. 1.

A mandatory injunction is stayed by a sufficient appeal bond, but a prohibitory injunction remains in full force. The object is to preserve the *status quo*. 81 Cal. 64.

A preventative injunction will not issue after the act complained of has been completed, and there is no threat of further acts. 81 Cal. 148.

Mandatory preliminary injunctions are seldom granted. The code definition omits the mandatory ingredient, and a very strong and urgent case is necessary to justify its issuance. 81 Cal. 148.

The sureties on an injunction bond are entitled to stand upon the precise terms of their contract. 82 Cal. 167.

In an action to enjoin the sale of land under a fraudulent judgment, the facts constituting the fraud must be found. 82 Cal. 170.

An injunction will not lie to enjoin a sale under an execution on the ground that a verbal agreement was made to stay execution in consideration of a confession of judgment, where it appears that the plaintiff neglected the remedy by motion to set aside

the execution that had been levied. 85 Cal. 235.

If the defendants are doing and threatening to continue acts which will destroy growing crops, it is such a case of irreparable injury as will warrant an injunction whether the plaintiff or his tenant be in possession. 85 Cal. 205.

Case where the court was held not to have abused its discretion in refusing an injunction against the erection of a bridge by a municipality. 85 Cal. 614.

Where the work sought to be enjoined consists of public improvements partially completed, courts will be reluctant to grant an injunction. 85 Cal. 614.

An injunction will issue to restrain a tax collector from selling a warehouse for an invalid delinquent tax upon the goods stored therein. 85 Cal. 196.

Case where a temporary injunction was held proper in an action for accounting. 85 Cal. 177.

An injunction will lie against the raising of the level of the street so as to interfere with the reasonable use thereof by an abutter. 85 Cal. 107.

Where several tort-feasors do not act in concert to produce an injury to the plaintiff, an injunction will lie against all of them in a joint action; but a joint judgment for damages is erroneous, and will be reversed. 87 Cal. 430.

Equity will protect by injunction an equitable title to a ditch and water secured by the fulfillment of a contract. 87 Cal. 126.

No alleged defects in the organization of an irrigation district can be reviewed in an injunction suit. 87 Cal. 140.

A tax-payer of a city has sufficient interest in the subject-matter to enjoin the consummation of an illegal contract by the city. 87 Cal. 603; 87 Cal. 631.

Where the injurious effects of a lawful occupation may be prevented without entire abatement, only the cause of the specific injurious effect should be enjoined. 87 Cal. 134.

The fact that the unlawful diversion of water had taken place before the suit was commenced is no bar to an injunction against the continuance of such diversion. 87 Cal. 296.

When a diversion of water from a riparian owner is wrongful, proof of damages is not prerequisite to an injunction. 87 Cal. 296.

A finding that on a certain day the defendant deprived the plaintiff of the use of the water is insufficient to sustain an injunction without a finding that the defendant was continuing such diversion, or threatened to continue it. 87 Cal. 503.

See ACQUESCENCE; APPEAL; BONDS; EASEMENT; ESTOPPEL; MINING CLAIM; NUISANCE; WATER RIGHTS.

INNKEEPERS.

An innkeeper is not liable to a boarder for a loss of baggage destroyed as the result of a purely accidental fire. 87 Cal. 483.

Distinction between boarders and mere transient travelers or guests pointed out. 87 Cal. 483.

INSANE PERSONS.

The provision of section 1766 of the Code of Civil Procedure authorizing the court to restore a person adjudged insane or incompetent is only applicable to those for whom guardians have been appointed. 87 Cal. 192.

Persons adjudged insane can only be discharged by the officers of the asylum, or upon writ of *habeas corpus*. 87 Cal. 192.

The effect of a discharge by the officers of an asylum is to restore the person to legal capacity to sue. 87 Cal. 192.

An action for damages will lie for a malicious prosecution on a charge of insanity resulting in a commitment to an insane asylum. In such action the order of commitment is not conclusive of the plaintiff's insanity or of probable cause for the prosecution. 87 Cal. 192.

See CRIMINAL LAW; FRAUD; GUARDIAN AND WARD; INSTRUCTIONS; UNDUE INFLUENCE; WILLS.

INTERVENTION.

A complaint in intervention by a landlord alleging collusion between tenant and a third party held insufficient. 69 Cal. 573.

In a suit by a pledgor to enforce the pledge, his assignee may intervene to protect his rights. 74 Cal. 250.

The right to intervention cannot be questioned for the first time on appeal. 76 Cal. 269.

A complaint of intervention in a creditor's suit for the purpose of reaching trust property held sufficient. 85 Cal. 488.

It is not error to allow an intervenor to amend his complaint at the trial so as to conform to the proofs. 85 Cal. 488.

It seems that an objection to the right to intervene must be by motion to strike out. 76 Cal. 269.

Notice of appeal must be served on intervenors. 83 Cal. 563.

An appellant who is not prejudiced cannot be heard against an award in favor of intervention. 78 Cal. 144.

Proceeding to enforce labor liens under section 1206 of the Code of Civil Procedure is in the nature of intervention. 83 Cal. 222.

Answer to intervention deemed controverted. 78 Cal. 144.

INSOLVENCY.

An order refusing a discharge in a United States court is a bar to a discharge for the same debt in the state court. 68 Cal. 203.

Involuntary insolvency cannot be prosecuted by creditors who have become mere assignees for the purpose. 68 Cal. 238.

The homestead set apart to the insolvent need not be his residence. 69 Cal. 244.

In a petition in involuntary insolvency, the firm name of the petitioners is sufficient. 70 Cal. 132.

A petition in involuntary insolvency must state the facts showing the indebtedness, as in an ordinary suit to recover on an indebtedness. 70 Cal. 132.

The conditions for a discharge under the act of 1880 are not retroactive. 71 Cal. 113.

Steam-thrashers and outfit are not exempt from execution as farming implements. 71 Cal. 74.

The creditors may appear to contest the setting apart of property as exempt. 71 Cal. 74.

Sufficiency of proceedings as the basis of discharge under the act of 1852 considered. 72 Cal. 442.

An instruction that insolvency proceedings should be strictly construed held erroneous. 72 Cal. 442.

An instruction that if an insolvent had not literally complied with the insolvent law, or had made any false statement in his schedule, without regard to fraudulent intent, is erroneous. 72 Cal. 422.

Under the act of 1880, a promise to pay certain creditors their claims in full if the discharge was not opposed is sufficient ground for refusing such discharge. 72 Cal. 317.

As a defense, a discharge in insolvency must be specially pleaded. 72 Cal. 65.

A discharge fraudulently granted may be set aside by any suitable proceedings. 72 Cal. 317.

If pending a suit a plaintiff becomes insolvent, his assignee need not be substituted in his place. 72 Cal. 264.

Assignees in insolvency who appeal in certain cases must provide the usual appeal bonds. 72 Cal. 97.

An order directing an assignee to account is not appealable. 73 Cal. 9. See 74 Cal. 381.

The court may order an assignee to account as often as occasion seems to require. 73 Cal. 9.

A mortgage agreed on for several months, but not executed until within thirty days before insolvency proceedings, will be considered as executed on the date when agreed for. 73 Cal. 325.

A subsequent adjudication of insolvency will not relieve from liability to pay alimony. 73 Cal. 97.

A discharge only affects debts in existence when the petition was filed. 74 Cal. 266.

Finding in involuntary insolvency held sufficient. 74 Cal. 381.

A judgment for fraudulent acts is not satisfied by a discharge in insolvency. 74 Cal. 183.

An unrecorded chattel mortgage is void as against the assignee in insolvency of the mortgagor. 84 Cal. 554.

Action by assignee against fraudulent grantee of insolvent lies without any previous demand. 75 Cal. 185.

Property exempt from execution does not pass to assignee under the assignment. 75 Cal. 496.

A confession of judgment is not of itself proof of fraudulent knowledge; a transfer not made in the usual course of business is only *prima facie* evidence of fraud. 76 Cal. 567; 78 Cal. 573; 80 Cal. 420.

A mere clerical error in the name of the insolvent, in notice to creditors, will not invalidate it. 77 Cal. 152.

A discharge is *prima facie* evidence of the regularity of the proceedings. 77 Cal. 152.

The mere vagueness of the petition will not render the proceedings open to collateral attack. 77 Cal. 152.

An omission that does not amount to fraud or false swearing is not fatal to a petition. 77 Cal. 152.

Partnership property cannot be exempt by law from forced sale, whatever its character. 77 Cal. 403.

A debtor who is unable to pay his debts as they fall due is insolvent, under the act of 1880. 78 Cal. 573. But see 84 Cal. 41.

The transferee of an insolvent who has knowledge sufficient to put him on inquiry that would disclose his vendor's insolvency is charged with notice of such insolvency. 78 Cal. 573; 80 Cal. 420.

Omission to keep proper account-books, regardless of intent, is cause for refusing a discharge under the act of 1880. 78 Cal. 399.

A writ of prohibition will not lie to restrain a receiver in insolvency from taking possession of the property held by an assignee under an assignment for benefit of creditors. 78 Cal. 418.

A certificate of discharge is *prima facie* valid against everybody. 79 Cal. 183.

The insolvent debtor is an essential party to an appeal from every order involved in the insolvency proceedings. 79 Cal. 248.

It seems foreign corporations doing business in this state, and having property here, are subject to involuntary insolvency. 18 Pac. Rep. 794 (not reported).

A transfer with knowledge of insolvency is not rendered valid because taken in payment of a debt of trust. 80 Cal. 420.

Transfer of partnership interest by insolvent; recovery by the assignee. 82 Cal. 119.

Debts created by fraud are among those

excepted from the operation of a discharge in insolvency. 82 Cal. 219.

Opposition to discharge on the ground of false claim of exemption, held not sufficient. 83 Cal. 153.

A debtor is not insolvent if he has means or resources to pay his debts as they become due in the ordinary course of business, though he may not have money in bank to meet them, or to pay a particular debt when due. 84 Cal. 41.

An appeal from an order of adjudication in insolvency requires only an ordinary appeal bond to stay all proceedings. The functions of a receiver are not suspended by such appeal. 84 Cal. 7.

The omission from schedule of worthless debts will not invalidate discharge. 77 Cal. 152.

Opposition to discharge on the ground of fraud is rendered invalid by a prior decision that such fraud did not exist. 84 Cal. 95.

An insolvent who in good faith includes in his schedule some property which he did not really own cannot be barred from a discharge for such error. 84 Cal. 322.

The assignee of the insolvent cannot maintain replevin against him for property which he never owned. 84 Cal. 476.

A discharge in insolvency relates back to all judgments obtained pending such discharge. 80 Cal. 472.

The certificate of discharge is proof of such discharge, but the debtor must prove the claim was included in such discharge. 80 Cal. 472.

From obligations which arise under a fiduciary character, there is no discharge. 80 Cal. 472.

A fraudulent transferee is not entitled to be reimbursed for the price paid by him for the property of the debtor. 75 Cal. 357.

Slight errors in publication of notices will not invalidate them. 79 Cal. 351.

Complaint of assignee against fraudulent vendee held sufficient. 81 Cal. 622.

An innocent and unintentional mistake in the petition will not bar a discharge in insolvency. 85 Cal. 76.

The pendency of an appeal from an order setting apart a homestead is no bar to a discharge in insolvency. 85 Cal. 76.

A discharge in insolvency is a bar to an action against an insolvent for the recovery of money which became due after the discharge, but under a previous contract. 85 Cal. 549.

A debt payable at a future time may be proven against the estate of an insolvent. 85 Cal. 549.

An opposition to a discharge must be limited to the grounds set forth in the opposition as filed. 85 Cal. 71.

The insolvent act makes it the duty of the court to set apart a homestead for the use and benefit of the insolvent. 85 Cal. 71.

The burden of proof is on a creditor who

opposes a discharge to prove the facts set forth in his opposition. 85 Cal. 71.

The fact that an insolvent lessee has abandoned the lease without excuse will not permit the lessor to prove a case of damages against his estate beyond the date of his insolvency. 85 Cal. 119.

Action by an assignee in insolvency to rescind a sale on the ground that the price was inadequate, and that the purchaser had conspired with others to prevent competition. 85 Cal. 522.

Unless it appears that the transfer was made within one month before proceeding in insolvency with the intention to give preference to the creditor, it is immaterial what the creditor suspected or believed as to the solvency of the debtor. 87 Cal. 613.

A jeweler's safe owned and used by him in the business of a jeweler and watch-repairer is exempt from execution, and should be set apart to him in insolvency. 87 Cal. 292.

Where property is mortgaged, a delivery of the mortgaged property to the mortgagee at the date of insolvency is not void, where the value of the property is less than the debt for which it was mortgaged. 87 Cal. 566.

An attachment levied within a month of filing a petition in insolvency is dissolved, and is not revived by the dismissal of the insolvency proceedings. 87 Cal. 453.

A discharge obtained by fraud or without due notice will be set aside. 81 Cal. 652.

A discharge in this state is no bar to a suit in this state upon a judgment obtained in another state in favor of a non-resident of this state. 81 Cal. 151.

The burden is upon creditors to show that the insolvent who has made the requisite affidavit is not entitled to his discharge. 81 Cal. 350.

A preference given when the debtor did not know that he was insolvent will not bar his discharge. 81 Cal. 350.

The insolvent has nothing to do with the appointment of the assignee, and the failure to have one appointed cannot affect his rights to a discharge. 81 Cal. 350.

It seems an insolvent has a right to assign accounts to his attorney to defray the necessary charges of his insolvency proceedings. 81 Cal. 351.

The creation of a debt by fraud is not ground for refusing a discharge in insolvency. 82 Cal. 219.

Instructions as to fraudulent intent held proper. 82 Cal. 119.

See **EXECUTION; FRAUD; HOMESTEAD; PLEADING.**

INSTRUCTIONS.

For further instructions in criminal cases, see **CRIMINAL LAW.**

Instructions held to be erroneous because

on weight of testimony and argumentative. 68 Cal. 109.

A trial court may state the evidence and instruct what it tends to prove. 68 Cal. 109.

Instructions as to reasonable doubt held not prejudicial to defendant, but favorable. 69 Cal. 180.

Where there is no conflict as to the commission of the crime, the court may so instruct. 69 Cal. 180.

Instructions as to an *alibi* held not erroneous. 69 Cal. 180.

A party cannot except to instructions given at his own request. 70 Cal. 572.

An instruction that assumes a fact is not erroneous if the fact is admitted or there is no conflict as to its existence. 70 Cal. 61.

Errors of instructions must appear in the record. 70 Cal. 98.

Oral instructions not taken down are erroneous in a criminal case. 70 Cal. 648.

To refuse an instruction not germane to the evidence is not error. 71 Cal. 223; 78 Cal. 202; 77 Cal. 147.

To refuse an instruction already given is not error. 71 Cal. 602; 76 Cal. 41; 76 Cal. 521; 71 Cal. 395.

The jury will be presumed to have decided correctly if correctly instructed. 71 Cal. 565.

Error in refusing instruction is cured by its being given afterwards, in effect. 73 Cal. 420; 74 Cal. 619.

The refusal of a certain instruction in a suit for damages for assault relative to the intoxication of the defendant held proper. 74 Cal. 148.

Where proper instructions are refused, and the record affirmatively shows that none such were given, the judgment must be reversed. 83 Cal. 194.

An instruction that assumes a material fact in dispute is erroneous. 76 Cal. 242; 77 Cal. 239.

Errors in instructions not excepted to will not be considered. 76 Cal. 474.

Instructions based upon the evidence as rendered are proper even if the evidence itself might be excluded if objected to. 76 Cal. 487.

The relevancy of an instruction cannot be considered, in the absence of the evidence given. 76 Cal. 404.

An instruction improperly controlling the jury in fixing damages is cause for reversal. 76 Cal. 240.

A failure to repeat an instruction at the request of the foreman held not error. 76 Cal. 192.

An error of law in instruction is immaterial if the verdict is necessarily correct. 76 Cal. 230.

An instruction may be properly refused because already given or inapplicable. 76 Cal. 521.

The assumption of an undisputed fact is not error. 77 Cal. 267.

An abstract instruction which could not have misled will not be reviewed. 77 Cal. 287.

The erroneous admission of evidence may be cured by an instruction. 77 Cal. 449.

An instruction too broad, but which did not mislead, is not ground for reversal. 77 Cal. 479.

Instructions may be given to suit each party's theory of the case, if not conflicting. 77 Cal. 588.

When the bill of exceptions omits the evidence, the judgment will not be reversed for refusal to give an instruction. 77 Cal. 36; 77 Cal. 39.

A harmless error in instructions is not ground for reversal. 77 Cal. 94.

Instructions should be read together in passing on their relevancy. 84 Cal. 573.

A certain instruction held incorrect under any view of the case. 84 Cal. 168.

A clerical error which could not mislead the jury held immaterial. 84 Cal. 489.

An instruction that the plaintiff must recover all he claims or none held improper. 84 Cal. 207.

Where secondary evidence of the contents of an instrument is given without objection, it is error to instruct that such instrument is not before the jury. 84 Cal. 37.

An abstract instruction calculated to mislead, and not applicable to the case, is erroneous. 78 Cal. 15.

Instructions must be considered as a whole. 78 Cal. 317; 78 Cal. 247.

An instruction a part of which is improper should be refused. 78 Cal. 202.

An instruction as to self-defense held proper as a whole. 78 Cal. 41.

The jury are bound by the instructions of the court, whether correct or not. 79 Cal. 317.

When the instructions are sufficiently full, it is not error to refuse to give others. 79 Cal. 411.

Instructions cannot be reviewed unless excepted to. 79 Cal. 404.

The practice of reading opinions of the supreme court as part of the instructions is a dangerous one, in view of the frequent changes in its opinions. 79 Cal. 419; 79 Cal. 224.

Certain instructions held to be proper as a whole. 79 Cal. 224.

Certain statements in the specifications of error held not evidence that certain instructions were given. 80 Cal. 146.

It is not harmful error to refuse to instruct the jury as to what they already know in reference to their right to consider evidence which is admitted without objection. 81 Cal. 81.

The fact that the court assented to a request to have an exception entered to all in-

structions, and refused to give instructions, is sufficient, though no exception was in fact entered in the minutes of the court or in the reporter's notes. 87 Cal. 399.

A verdict is not against law if there was evidence to support it, consistent with the instructions. 87 Cal. 23.

A certain instruction relative to negligence in allowing a child to become exposed to danger held proper. 87 Cal. 545.

Refusal to instruct a jury that it would be justified in inferring fraud from certain circumstantial and presumptive evidence held error. 87 Cal. 399.

Instructions not pertinent to the evidence held properly refused. 81 Cal. 289; 82 Cal. 250.

An instruction must be construed in connection with all other instructions, to ascertain its meaning. 81 Cal. 190; 82 Cal. 119.

In equity cases, the verdict of the jury is merely advisory, and error in the instructions is immaterial. 85 Cal. 205; 85 Cal. 542.

Instruction as to an *alibi*. 86 Cal. 403; 86 Cal. 225.

Instruction as to insanity. 86 Cal. 295.

See ADVERSE POSSESSION; CRIMINAL LAW; EMPLOYER AND EMPLOYEE; JURORS; MINE CLAIMS; NEGLIGENCE; NUISANCE.

INSURANCE.

Action of one insurance company against another to recover a *pro rata* alleged to be due in conducting a defense for their joint benefit. 68 Cal. 430.

Evidence that plaintiff did not know what his application contained held inadmissible under his complaint. 70 Cal. 585.

In a policy containing a condition that adjustment should be first attempted by arbitration held that until such attempt, legal action was premature. 72 Cal. 297; 70 Cal. 198.

Restrictions as to marine insurance construed. 70 Cal. 586.

A provision that if the property was sold the policy should lapse held valid. 71 Cal. 11.

The general agent of a company at a particular place has authority to waive a condition of a policy. 72 Cal. 91.

Denial of the loss of a vessel held insufficient to raise the issue. 70 Cal. 586.

A waiver continues in a policy as renewed. 72 Cal. 91.

A certain question as to the depreciation of a building held properly ruled out. 72 Cal. 535.

A provision requiring notice of loss is waived by the knowledge and award of the insurer's agent, regardless of a provision in policy that no condition can be waived ex-

cept by the indorsement of the president or secretary. 72 Cal. 297.

A parol contract to issue a policy is valid. 73 Cal. 216.

The act of March 3, 1885, imposing certain burdens upon foreign insurance corporations held unconstitutional. 74 Cal. 113.

Where a life policy is payable subject to the will of the insured, and the latter dies testate, the executor is the proper payee. 75 Cal. 245.

Where the application is made out by the agent, a misstatement of which the insured was not cognizant will not vitiate the policy, even though by the terms of the policy the statement constitutes a warranty. 76 Cal. 415.

An erroneous statement as to value is not conclusive of fraudulent intent. 76 Cal. 415.

A stipulation in a policy that an agent cannot waive any condition applies to what occurs before the loss. 76 Cal. 415.

Waiver may be inferred from acts. 76 Cal. 415.

Representation held not to mean that the insured resided on the premises. 76 Cal. 50.

Misstatements which the general agent knew to be false when executing the policy will not invalidate it. 76 Cal. 50.

Warranty to maintain a watchman held not broken. 76 Cal. 235.

Where the rule of an association is, that each member shall designate a nominee to receive a certain sum on his death, a failure to designate any nominee avoids all liability of payment. 76 Cal. 494.

The condition that in case a member used liquor, his right to insurance should cease, held to be valid. 76 Cal. 109.

The fact that member had never been expelled will not constitute a waiver of his violation of the insurance contract. 76 Cal. 109.

Explosion of a steamboat boiler is not "a peril of the sea," within the meaning of marine insurance. 76 Cal. 145.

The usual provision in the Travelers Insurance Company's policies as to death from injuries inflicted by any one is absolute. 77 Cal. 246. But see *Richards v. Travelers Ins. Co.*, decided June, 1891.

Non-waiver of default in payment of premium note by acceptance of payment. 78 Cal. 619.

In a complaint on an insurance policy, a copy of the application need not be set out. The application being in the hands of the company, it can best set it out in its answer, and plead non-performance of the warranty. 78 Cal. 181.

Construction of stipulation in policy as to notice, proof of loss, and submission to arbitration. 78 Cal. 181.

When proof of loss is required, the complaint must aver it, or that it has been waived. 78 Cal. 468.

Concealment in marine insurance as a cause for rescission of policy. 80 Cal. 440.

In an insurance society, acceptance of payment after default waives all forfeitures of the benefit certificate, and formal reinstatement is immaterial. 81 Cal. 340.

When an insurance company or society denies all liability for the payment of insurance, proof of the death is waived. 81 Cal. 340.

Guaranty funds under the act of 1866 construed. 81 Cal. 364.

A provision that the company shall not be liable until the policy is paid is waived by the delivery of the policy without such payment. 83 Cal. 246.

Ostensible general authority of insurance agents, how proven. 83 Cal. 246.

A condition against written waiver need not include an inhibition against oral waiver. 83 Cal. 246.

Knowledge of the agent is the knowledge of the company; and such knowledge may constitute a waiver of what might otherwise be a valid defense. 83 Cal. 246.

Construction of clauses in the policy as to arbitration and limitations as to time in which suit may be brought. 83 Cal. 473.

When a life policy reserves an exception in case of suicide, the burden of proof is on the insurance company to plead and show suicide. 84 Cal. 570.

A change of beneficiary in a mutual benefit association made according to its by-laws, and indorsed by its secretary, held valid substitution. 87 Cal. 306.

The insertion in a will of a direction to the beneficiary, to apply the proceeds by mutual benefit policy is not an attempt to devise by will the policy or its proceeds. 87 Cal. 306.

A policy of insurance can only be canceled either by the authority of the policy holder, or by operation of law, or in accordance with the conditions upon which it was issued. 86 Cal. 566.

Section 2617 of the Civil Code does not confer upon the insured any right to insist upon a cancellation of a policy without some good cause. 86 Cal. 248.

If a policy was obtained by false representation as to the extent of ownership, no recovery can be had thereon, if the policy contains a provision to that effect. 86 Cal. 260.

Ignorance of the terms of the policy is no excuse for a misstatement. 86 Cal. 260.

Essential averments of a complaint on a life insurance policy. 84 Cal. 570.

When submission to arbitration before suit is a condition of a policy, arbitration is not a condition precedent to a right of action, unless it is demanded after a proof of loss within a reasonable time. 82 Cal. 263.

A mistake in making an under-proof of loss is not binding on the claimant when he resorts to law. 82 Cal. 263.

Provisions for arbitrators must be definite as to number, and provide a mode of selection. 82 Cal. 263.

See AGENCY; BENEFICIAL ASSOCIATIONS; CERTIFICATES; MORTGAGE; WAIVER.

INTEREST.

How computed on foreign judgments. 72 Cal. 264.

Illegality of usury. 77 Cal. 548.

Interest on Sacramento coupon bonds. 82 Cal. 550; 82 Cal. 562.

Interest upon interest. 82 Cal. 550.

See ACCOUNT; BOND; CONVERSION; JUDGMENTS; NEGOTIABLE INSTRUMENTS; PRORATE LAW; SURETYSHIP; TRUSTS.

INTERPLEADER.

In proceedings supplementary to execution, the debtor is not entitled to have other persons interpleaded. 72 Cal. 513.

Proceedings on, where complaint is amended. 81 Cal. 145.

The general rule is, that a bill of interpleader which denies the defendant's claim cannot be maintained. 81 Cal. 145.

An interpleader need not offer to pay costs. 81 Cal. 145.

IRRIGATION DISTRICTS.

Irrigation districts are *quasi* public corporations. 76 Cal. 360; 79 Cal. 351.

The act of May 7, 1887, providing for the organization of irrigation districts, held constitutional. 76 Cal. 360.

Proceedings under the irrigation district laws are to be liberally construed. 79 Cal. 351.

Power of the board to allow a new bond to be filed. 79 Cal. 351.

Validity of meetings of board. 79 Cal. 351.

Misnomers in publication. 79 Cal. 351.

Election proclamation and precincts. 79 Cal. 351.

Form of bonds. 79 Cal. 351.

The Wright irrigation law is constitutional, and the districts thereunder are public corporations. 87 Cal. 140.

A proceeding under the act supplemental to the Wright act is in the nature of a proceeding *in rem* to determine the *status* of the district and its power to issue bonds. Under such act the service of process by publication and posting gives the court jurisdiction; and its judgment thereunder is valid

as against all the world upon all questions involved in the case. 87 Cal. 140.

See MUNICIPAL CORPORATIONS; PUBLIC OFFICERS.

JAIL.

See CRIMINAL LAW.

JEOPARDY.

See CONSTITUTIONAL LAW; CRIMINAL LAW.

JOINT DEBTORS.

See COUNTERCLAIM; DEBTOR AND CREDITOR; JUDGMENT; HUSBAND AND WIFE; PARTIES; PLEDGING.

JOINT TENANT AND TENANTS IN COMMON.

The deed by one joint tenant purporting to convey an entire interest in land is sufficient to create color of title as against the other co-tenant. 68 Cal. 123.

Adverse possession against a co-tenant held not sustained by the evidence. 68 Cal. 317.

Title by adverse possession, or ouster against a co-tenant, must be of an unequivocal, overt, and notorious nature, and such as will impart information and notice to such co-tenant. 70 Cal. 350; 76 Cal. 136.

Real property purchased partly by the separate funds of the wife, and partly by money borrowed by her, becomes the property of both husband and wife as tenants in common. 70 Cal. 282; 79 Cal. 200.

Property of co-tenants conveyed for a particular purpose. Held, that the grantee became a trustee. 70 Cal. 89.

Prior to March 9, 1868, a homestead could not be acquired in land held in joint tenancy, nor without having the same enclosed, and in exclusive occupancy. 71 Cal. 504.

Partnership property cannot be exempt from execution. 77 Cal. 403.

A tenant in common has no power, as against his co-tenant, to convey away an easement on the land or a right to divert its waters. 74 Cal. 156.

Tenancy in common in a growing crop exists where land is farmed on shares. 75 Cal. 319.

Where a party is in the adverse possession of land owned by several co-tenants, and

afterwards procures a deed from one of the co-tenants, he does not thereby become a co-tenant, so as to change the hostile character of his possession. 75 Cal. 337.

A tenant in common is under no obligation to pay taxes on the interest of his co-tenant. 76 Cal. 136.

The purchase of a tax title by a tenant in common of his co-tenant's interest indicates a purpose to claim adversely. 76 Cal. 136.

Proof of a tenancy in common is not sufficient to sustain a complaint for partnership accounting. 76 Cal. 44.

Parol evidence is inadmissible to show that land conveyed by a tenant in common to his co-tenant was to be held in trust, or to be reconveyed. 76 Cal. 469.

The acts and declarations of one co-tenant in the hearing of another is competent evidence against both. 79 Cal. 304.

A finding of adverse possession against a co-tenant held not sustained by the evidence. 79 Cal. 140.

One tenant in common may recover the possession of the entire tract from an intruder without joining his co-tenant as plaintiff. 80 Cal. 629. In such case the recovery inures to the benefit of all the co-tenants. 80 Cal. 368.

An agreement to work a mine "on tribute" creates a tenancy in common in the output of the mine when extracted. 80 Cal. 553.

Where certain funds are fraudulently used for the purchase of property in the name of a third party, the real owners of such funds become the equitable owners as tenants in common of such property. 80 Cal. 378.

A tenant in common cannot show title by adverse possession against his co-tenant without proof of notice of his adverse possession. 81 Cal. 571; 70 Cal. 350.

The statute of limitation in relation to adverse possession does not run during administration in favor of a co-tenant who obtained possession under a decree of partial distribution. 81 Cal. 571.

An agreement between two tenants in common in relation to separate portions of the joint tenancy held valid as to probate distribution. 82 Cal. 135.

Evidence that a co-tenant paid all the taxes on certain lands held not admissible to prove that a deed to him from a co-tenant was *bona fide*. 82 Cal. 170.

If one tenant in common actually ousts another, the statute of limitation at once begins to run, regardless of the fact that both persons are mistaken as to their title. 83 Cal. 72.

Adverse possession by a co-tenant or his trustee against another co-tenant must be open and known, to set the statute of limitations in motion. 86 Cal. 500.

JUDGMENTS.**GENERALLY.**

The main difference between collateral and direct attacks on a judgment is, that in the former the record is conclusively presumed correct, while in the latter the true facts may be shown to contradict the record. 84 Cal. 27; 84 Cal. 607.

An application for relief under section 473 of the Code of Civil Procedure cannot be by a separate suit. 84 Cal. 107.

VALIDITY OF.

A judgment by confession is void unless made according to law. 71 Cal. 183.

A judgment by consent is as valid as one entered a ter a trial. 71 Cal. 470.

A judgment showing jurisdiction on its face is not subject to a collateral attack. 71 Cal. 156.

The supreme court will not ordinarily interfere with an order setting aside a default. 86 Cal. 395.

A judgment void on its face may be vacated upon motion at any time. 86 Cal. 395; 86 Cal. 400.

A judgment for the partition of several tracts of land cannot be reversed by piecemeal. A reversal as to one tract sets aside the whole judgment. 86 Cal. 395.

A judgment prematurely entered by default is only voidable. 71 Cal. 156; 75 Cal. 213.

The misnomer of a defendant by the omission of his middle name does not invalidate the judgment by default or an execution sale. 72 Cal. 562.

A judgment may be void as to some defendants and valid as to others. 72 Cal. 264.

A judgment of foreclosure held not void for uncertainty of description. 74 Cal. 468.

A judgment void on its face is one that appears to be void from the inspection of the judgment roll. 84 Cal. 607.

When a judgment is rendered by default on service of summons by publication, the records should show the affidavit, order, and proof of service. 74 Cal. 400; 74 Cal. 493; 76 Cal. 400.

But a judgment by default upon service of summons by publication is good against a collateral attack without proof of the affidavit for publication or order. 75 Cal. 2. 3.

If service of summons is made by a private person, his affidavit must show him to have been over eighteen years at the time of service; otherwise the judgment is void for want of jurisdiction. 75 Cal. 376.

A judgment of foreclosure for a street assessment cannot be collaterally attacked by proof of prior payment. 75 Cal. 240.

The reversal of a judgment cannot affect any interests involved in the judgment, but not affected by the grounds of reversal. 75 Cal. 373.

A judgment by default on service of sum-

mons by publication must show, under the Practice Act, the affidavit, order, and proof of service, or it is void. 74 Cal. 493. But see 75 Cal. 214.

A judgment of divorce becomes binding on being signed by the judge. 77 Cal. 220; 76 Cal. 213. Or when the order is rendered and entered on the minutes. 83 Cal. 415.

A judgment becomes rendered when the court pronounces its decision. It need not be in writing or be signed by the judge. 77 Cal. 220.

A judgment rendered against a party during his life may be entered after his death. 77 Cal. 220; 83 Cal. 415.

Where the court has secured jurisdiction, no irregularity can invalidate the judgment in favor of collateral attacks. 77 Cal. 156.

The finding of a court that its process was duly served is conclusive against a collateral attack. 77 Cal. 156.

In a motion to set aside a judgment for want of jurisdiction, the question of the service of summons and the authority of a person who represented himself as the party's attorney may be inquired into. 79 Cal. 188.

Section 1916 of the Code of Civil Procedure does not mean that a void judgment will be enforced as if it were valid; it simply shows how it can be shown to be void. 79 Cal. 188.

The judgment of a court of a sister state, held sufficiently attested to satisfy section 1905 of the Code of Civil Procedure. 81 Cal. 151.

SETTING ASIDE.

The court may at any time, even beyond six months after its entry, set aside a judgment entered without authority of law. 68 Cal. 422; 68 Cal. 369; 74 Cal. 400; 76 Cal. 400; 84 Cal. 107.

A suit to set aside a judgment obtained by fraud need not be brought within six months from its entry. 68 Cal. 369.

A judgment entered for a sum in excess of the verdict is erroneous, and will be modified on appeal. 69 Cal. 155.

In an action to restrain a voidable judgment, the complaint must show that the defendant has a good defense to the suit in which the judgment was entered. 71 Cal. 156.

A judgment of dismissal for want of prosecution may be set aside for good cause. 71 Cal. 94.

A motion to set aside a judgment is a direct, and not a collateral, attack. 74 Cal. 400.

The frauds for which equity grants relief against judgments are those which are extrinsic or collateral to the matter tried. Errors of law or fact, or fraud in a matter examined in the suit, are not grounds for relief. 84 Cal. 107.

The absence from the judgment roll of a paper showing service of summons cannot

invalidate against a recital that the defendant was duly served with process. 84 Cal. 607.

A judgment not void on its face, and showing service of summons, cannot be set aside on motion. 84 Cal. 611.

A judgment void on its face may be set aside at any time. 74 Cal. 400; 76 Cal. 400.

The fact that neither the party nor his attorney were aware that the case had been set for trial makes out a case of excusable neglect for not being present. 85 Cal. 116.

Judgment rendered in 1865; motion to vacate it for want of jurisdiction, in 1888. Held, that there is no provision of the law that can be held to authorize the vacation of a judgment on a mere motion after so long a time. There is a provision (Code Civ. Proc., sec. 473) authorizing such a proceeding within a limited time, on certain grounds. 80 Cal. 200.

Case in which a party was held as not legally entitled to have a judgment by default set aside for surprise, etc. 82 Cal. 611.

An application to set aside a judgment is directed to the sound legal discretion of the court, and an order granting it will not be reversed unless the discretion is abused. 85 Cal. 116.

The refusal of the trial court to set aside a judgment because the attorney mistook the date of the trial held not an abuse of discretion. 83 Cal. 453.

ENTRY OF.

A judgment on a plea of abatement should not be that the plaintiff take nothing. 70 Cal. 374.

The superior court has power to amend its judgment to conform to the directions of the supreme court. 71 Cal. 586.

A judgment on a verdict should be for the amount of the verdict, with legal interest from the time of the rendition of the verdict. 75 Cal. 590.

An action is not dismissed until the entry is made in the judgment-book. Entry in the register is not enough. 76 Cal. 372.

A judgment may be entered on Monday, on a verdict rendered the preceding Saturday night. 76 Cal. 532.

The provision of section 664 of the Code of Civil Procedure, requiring the judgment to be entered within twenty-four hours after verdict, is merely directory, and a failure to comply with it does not affect the validity of the judgment. 79 Cal. 69.

The clerk should include in a judgment on a verdict interest from the date of the verdict. 82 Cal. 184.

REVERSAL OF.

A judgment will not be reversed for a harmless error. 68 Cal. 463; 69 Cal. 454; 70 Cal. 518.

A judgment based upon a finding made

contrary to an admission in the pleadings, or contrary to the evidence, will be reversed. 71 Cal. 115.

A judgment for damages beyond what is claimed is erroneous. 75 Cal. 356.

A judgment against several persons alleged to have been partners is erroneous as to those who have neither appeared nor have been served with summons. 75 Cal. 590.

A judgment must decide the cause, either for or against each of the defendants. 76 Cal. 608.

A judgment on the pleadings is improper, where there is a single material issue presented by the answer. 87 Cal. 88; 87 Cal. 422.

A judgment cannot be rendered to settle rights not set forth in the pleadings. 87 Cal. 23.

A motion to set aside a judgment for mistake and excusable neglect should be denied, where the plaintiff's counsel voluntarily absented himself from the trial and had promised to dismiss the case. In such case a motion to set aside the order should be granted. 87 Cal. 211.

The action of the court in setting aside a judgment for inadvertence and mistake will not be disturbed, unless it appears that the court abused its discretion, even though the showing may be a weak one. 87 Cal. 523.

An order setting aside a judgment will not be disturbed, where the judgment was set aside through an inadvertence and mistake of fact of the defendant's attorney in relation to the title of the property involved. 87 Cal. 523.

Judgment on the pleading is proper, where the answer denies merely a conclusion of law. 87 Cal. 443.

In an action on replevin, the findings must cover the issue, or the judgment will be reversed. In such case a judgment not in the alternative, but merely for the return of the property, is erroneous. 86 Cal. 479.

A judgment reforming a declaration of trust is allowable, on the principle that equity presumes that that which ought to have been done was done, and gives it force and effect as if done. 85 Cal. 488.

A judgment by default against plaintiff for failure to amend, where no demurrer has been decided, will be set aside on appeal, if the complaint states any cause of action. 76 Cal. 299.

Consent to a judgment will not presumed, nor is the indorsement "agreed to" enough to show such consent. 76 Cal. 624.

A judgment by default granting different relief than that prayed for should be reversed. 78 Cal. 34.

A judgment will not be reversed at the instance of a defendant because no judgment was entered against a defendant who made default. 82 Cal. 184.

See APPEAL; COSTS; DIVORCE; FINDINGS; INSOLVENCY; JURISDICTION.

RES ADJUDICATA.

A judgment for the recovery of land is not a bar to a subsequent suit on a new title. 69 Cal. 188.

Proceedings to set off a certain judgment held not to be *res adjudicata* of an issue in another case. 76 Cal. 312.

Distinctions between different kinds of interlocutory decrees pointed out. 76 Cal. 381.

A contemporaneous decision of a federal court cannot operate as *res adjudicata*. 79 Cal. 633.

See ESTOPPEL.**ON PLEADINGS.**

Where the complaint sets up no cause of action, the defendant is entitled to judgment on the pleading, unless plaintiff asks leave to amend. 68 Cal. 210.

When improper, 87 Cal. 88; 87 Cal. 422; when proper. 87 Cal. 443.

See DEFAULT; DIVORCE; FINDINGS; JURISDICTION; JUSTICE'S COURT; REPLEVIN.

JUDGMENT ROLL.

JUDGMENT; APPEALS; PLEADING.

JUDICIAL DISCRETION.

Defined. 85 Cal. 116.

JUDICIAL NOTICE.

As to Point San José military reservation. 72 Cal. 183.

As to coin being the standard of value in California. 74 Cal. 199.

That Humboldt County is in this state. 75 Cal. 604.

That San Diego County is in this state. 68 Cal. 374.

That the end of the year is not harvest-time. 77 Cal. 236.

Of the proceedings of an action pending before the court in a contempt matter. 77 Cal. 198.

A court is bound to take judicial notice of its own decisions. 84 Cal. 424.

The court will take judicial notice that the county clerk is *ex officio* clerk of the superior court. 86 Cal. 197.

The court will take judicial notice of county boundaries and government subdivisions, but not of private surveys. 86 Cal. 197; 86 Cal. 210.

The court cannot take judicial notice that a counterclaim has been already pleaded in a former suit. 86 Cal. 449.

JURIES.

Jury trials in equity are discretionary. 68 Cal. 374.

A challenge for non-residence is a challenge for cause. 70 Cal. 8.

No exception is allowed for a challenge for cause. 70 Cal. 8.

The right to a jury trial is not waived by failing to demand it when the case is called. 70 Cal. 447.

Where a cross-complaint is equitable, the defendant is not entitled to a jury trial on the issue it raises. 71 Cal. 4:8.

A juror in a criminal case may be examined in accordance with the theory of the defense, and cross-examined in relation to such theory. 71 Cal. 548.

A refusal to allow counsel to read law or make a law argument to the jury is not error. 72 Cal. 248.

A dismissal of a juror after the completion of the panel held not error. 72 Cal. 205.

A rule of the superior court requiring parties who demand jury trials to pay jury fees in advance held valid. 73 Cal. 176.

An objection to the mode of drawing the jurors cannot be considered without the evidence. 73 Cal. 238.

In a suit to recover money, the jury have discretion to render either a general or special verdict. 77 Cal. 588.

An agreement that each juror should set down an amount, and that the total should be divided by twelve, and the result be the amount of the verdict, is not a chance verdict. 77 Cal. 588.

The right to peremptory challenges is absolute, and may be exercised at any time before the jury is sworn to try the case. 78 Cal. 118.

Even if a jury trial has been demanded, it is waived by failure to appear at the trial. 83 Cal. 225.

The court may permit counsel to read and comment upon its instructions previously settled. 83 Cal. 24.

No special oath need be administered to an officer in charge of a jury. 83 Cal. 24.

Where a jury is orally waived in open court for a consideration, the waiving party cannot repudiate the waiver on the ground that it was not entered on the minutes. 84 Cal. 272.

Irregularity in impaneling a jury is "error of law," and must appear by bill of exceptions or statement. 78 Cal. 118.

It is not error to impanel a jury in an equity case before framing the special issues. 79 Cal. 34.

The recital of a waiver of a jury trial cannot prevail over the bill of exceptions showing otherwise. 82 Cal. 471.

Where it appears that the case was tried with only eleven jurors, acquiescence will be presumed. 82 Cal. 523.

Where a verdict in a criminal case com-

vinces the court that the jury had willfully and purposely disregarded the evidence, it is the duty of the judge to discharge such jurors from further service. 85 Cal. 350.

A court has a right to discharge jurors not yet selected to try the case, or any of them, at any time, without giving any reason therefor. 85 Cal. 350.

A ruling of the trial court on the challenge of a juror for actual bias will not be reviewed on appeal. 87 Cal. 117.

JURISDICTION.

GENERALLY.

Of state courts over national banks. 83 Cal. 491.

The distinctions between transitory and local actions depend entirely upon statutory laws, and do not depend upon the distinctions between actions in *rem* and actions in *personam*. 83 Cal. 491.

The courts of this state have jurisdiction in a suit of one alien against another for damages caused by personal injuries outside the state. 75 Cal. 203.

OF SUPERIOR COURTS.

In action for damages for false assessment. 71 Cal. 87.

In disposal of property pending a divorce suit. 69 Cal. 633.

In action for libel. 69 Cal. 527.

In contempt. 77 Cal. 198; 79 Cal. 584; 70 Cal. 61; 81 Cal. 64.

To allow a renewal of motions. 70 Cal. 231.

By publication of summons. 70 Cal. 150; 70 Cal. 431; 74 Cal. 400.

In extending time to plead; limitation. 71 Cal. 583.

In entering up costs. 71 Cal. 254; 71 Cal. 268.

To order a new trial in a nonsuit in justice's court. 71 Cal. 582.

In cases of fraud. 71 Cal. 513.

In insolvency. 79 Cal. 594; 72 Cal. 442; 75 Cal. 225; 81 Cal. 151.

In foreclosure. 72 Cal. 259.

In judgment by consent. 71 Cal. 470.

In settling bill of exceptions pending appeal. 72 Cal. 197.

As tested by *habere corpus*. 72 Cal. 53.

Over receivers. 72 Cal. 572.

To set aside an order of change of venue. 73 Cal. 182.

In equitable constructions of wills. 73 Cal. 560.

In appointment of guardians. 74 Cal. 421.

In actions to quiet title. 74 Cal. 493.

In contest over swamp-lands. 74 Cal. 175.

In enjoining justices' courts. 75 Cal. 230.

To enter judgment by default. 75 Cal. 376.

Reviewable by *certiorari*. 75 Cal. 596.

In action involving real property. 76 Cal. 181; 87 Cal. 38.

In delayed proceedings for contempt. 76 Cal. 543.

In a miralry matters. 77 Cal. 286.

Conclusive effects of. 77 Cal. 156.

In attachment process. 78 Cal. 175.

Of misdemeanors. 78 Cal. 556.

Tested by a writ of prohibition. 78 Cal. 556.

The superior court, having general jurisdiction to enforce a rescission, has jurisdiction to appoint a receiver of the moneys and securities in this state, which the purchaser claims should be restored; and this regardless of the fact that the defendants are non-residents, or that the contract was made in Mexico. 85 Cal. 11.

The act creating the county of Orange did not deprive the Los Angeles courts of jurisdiction over cases previously commenced. 35 Cal. 280.

A justice of the peace has power to dismiss or refuse to dismiss a criminal action without regard to the order of the district attorney. 85 Cal. 585.

The *ad damnum* clause of a complaint in an action for damages constitutes the test of jurisdiction. 86 Cal. 459.

In an action for conversion, attorney's fees cannot be included as money expended in the pursuit of the property. 86 Cal. 459.

The superior court has no jurisdiction to foreclose a lien upon real property situated in another country. 87 Cal. 35.

A judgment against the contractors is not necessary to support the lien of the materialman. 87 Cal. 589.

In cases of adoption, the power of the superior court is special and limited, and its jurisdiction must appear by the record as to both the subject-matter and persons. 87 Cal. 640.

In proceedings to foreclose a mortgage, an answer setting up a junior mortgage, and praying for its foreclosure, must be treated as a cross-complaint, and served on all the parties affected thereby. 87 Cal. 161.

In suits of slander. 78 Cal. 571.

As affected by a federal decision. 79 Cal. 633.

As to change of venue. 79 Cal. 140.

In adoption proceedings. 80 Cal. 216; 87 Cal. 640.

In divorce proceedings. 80 Cal. 237.

To vacate judgment. 80 Cal. 199.

In partition in probate proceedings. 80 Cal. 490.

To issue writ of prohibition. 82 Cal. 613; 80 Cal. 40.

As to judgment against stockholders. 82 Cal. 630.

In *quo warranto*. 82 Cal. 238.

In trial of high misdemeanors. 78 Cal. 556.

To grant a new trial in an appealed justice's court case. 72 Cal. 475.

To enter judgment for costs. 76 Cal. 618; 71 Cal. 284.

In matters of contempt. 73 Cal. 487.

The superior court cannot enjoin the mandate of the supreme court. 83 Cal. 384.

Of superior court on appeals. 68 Cal. 245; 68 Cal. 407; 70 Cal. 564; 71 Cal. 550; 72 Cal. 475; 77 Cal. 305; 81 Cal. 590; 81 Cal. 222.

OF FEDERAL COURTS.

In divorce proceedings. 79 Cal. 633.

When a federal court has first acquired jurisdiction over the person and thing, its judgment is binding on the state courts. 84 Cal. 424.

It is the duty of the state court to enforce the injunctions of the federal courts, where they had prior jurisdiction. 84 Cal. 424; 84 Cal. 433.

OF INTERIOR TRIBUNALS.

Of justices' courts. 68 Cal. 490; 70 Cal. 564; 71 Cal. 556; 72 Cal. 562; 72 Cal. 232; 73 Cal. 3; 75 Cal. 253; 77 Cal. 541; 77 Cal. 121; 80 Cal. 40; 82 Cal. 613; 82 Cal. 284.

Of board of supervisors. 82 Cal. 286.

Of police courts. 78 Cal. 556; 78 Cal. 421.

Of land officers. 78 Cal. 235.

Of board of equalization. 82 Cal. 214.

OF SUPREME COURT.

On appeals. 69 Cal. 572; 69 Cal. 556; 72 Cal. 161; 73 Cal. 207; 74 Cal. 49; 75 Cal. 532; 77 Cal. 483; 78 Cal. 99; 78 Cal. 307; 79 Cal. 105; 79 Cal. 633; 82 Cal. 425. As to rehearings. 81 Cal. 408.

As to judgments on appeal in election contests. 79 Cal. 478.

In judgments by consent. 73 Cal. 297.

OF MUNICIPAL CORPORATIONS.

Over taxations. 77 Cal. 511.

See APPEALS; CRIMINAL LAW; CONTEMPT; COURTS; JUSTICES' COURTS; JUDGMENT; PUBLIC OFFICERS; SUMMONS.

JUSTICES' COURTS.

A copy of the account held a sufficient complaint in the absence of a demurrer. 68 Cal. 407.

A complaint in a justice's court need not be subscribed by the plaintiff or his attorney. 68 Cal. 407.

The fact that the justice did not enter up judgment on the verdict will not affect the right of appeal. 68 Cal. 407.

On an appeal on questions of law and fact, there can be no retrial as to fact, where no trial has been had on any issue of fact. 68 Cal. 98.

Where the appeal is on both law and fact,

the superior court must retry the case itself. 68 Cal. 245.

Where a notice of appeal was filed on one day, a copy thereof served on the next day, and an undertaking within four days afterwards, all within statutory time, held sufficient. 68 Cal. 24; 71 Cal. 550.

Justices' courts have no jurisdiction to recover a penalty for excessive toll. 68 Cal. 490.

A justice held entitled to his office until the appointment of his successor. 69 Cal. 519.

A justice's court has jurisdiction over a suit to recover a penalty under an ordinance, provided there is no question as to its legality. If such question be raised, it must be by verified answer. 69 Cal. 556.

An appeal to the superior court on law alone cannot be dismissed on the ground that it should be on both law and fact, if the statement shows the law point involved. Such a dismissal will be annulled on *certiorari*. 70 Cal. 628. See also 71 Cal. 550.

Appearance and trial without objection is a waiver of the sufficiency of the notice of appeal. 70 Cal. 527.

Where the value of property in replevin is stated to be over three hundred dollars, the justice's court has no jurisdiction. 70 Cal. 564.

A notice of appeal need not be filed before service. Nor need the undertaking be simultaneous with the filing of the notice. 71 Cal. 560.

Objection to want of service of summons is waived by going to trial without objection. 71 Cal. 555.

The plaintiff is not deprived of a right to appeal by payment of the judgment into court, and an entry to that effect on the justice's docket. 73 Cal. 11.

The powers of justices' courts are to be determined by the provisions of the code made expressly applicable to them, and not by the provision expressly applicable to courts of record. 74 Cal. 341.

Justices' courts cannot review their own judgments, except in some method expressly provided by law. 74 Cal. 341.

If on a judgment by a default, an appeal is taken on questions of "law and fact," it must be decided on questions of law alone. 77 Cal. 305.

There is no such thing as a rehearing in the superior court. It can only set aside its judgments under section 473 of the Code of Civil Procedure, or on a motion for a new trial. 77 Cal. 305.

When the verified answer shows want of jurisdiction, the case should be certified up to the superior court. 77 Cal. 541.

On a collateral attack upon a justice's judgment, it is not allowable to show that the defendant did not reside in the township where the judgment was rendered; this ob-

jection should have been taken at the trial. 77 Cal. 121.

The failure of sureties on an appeal bond to justify within five days after exception renders the appeal a nullity, nor can the superior court extend the time. 86 Cal. 74.

The superior court has jurisdiction to enforce its rules as to the time when the transcript on appeal from a justice's court must be filed. 86 Cal. 431.

A writ of mandate will lie to compel a sheriff to execute a writ of execution from a justice's court. 79 Cal. 213.

The justice's courts have jurisdiction to recover a penalty of two hundred dollars, given by statutes. 80 Cal. 40.

A cause certified up to the superior court cannot be changed to another county. 71 Cal. 382; 80 Cal. 559; 71 Cal. 555.

Where an undertaking is filed more than five days before notice of appeal, the notice of appeal is notice that an undertaking has been or will be filed within the thirty-day period. 84 Cal. 535.

A writ of prohibition will not lie to prevent a trial on appeal, on the ground that the undertaking was filed five days before the notice of appeal. 84 Cal. 535.

Prohibition will not lie to compel a justice of the peace to allow a party charged with vagrancy a jury trial. 82 Cal. 613.

A certified copy of the entries in a justice's docket is *prima facie* evidence of the facts stated, and admissible in an action for malicious prosecution. 87 Cal. 629.

See APPEALS; ATTACHMENT; ATTORNEY AT LAW; CERTIORARI; EXECUTION; INJUNCTION; JUDGMENT; JURISDICTION; MUNICIPAL CORPORATIONS.

KIDNAPING.

See CRIMINAL LAW.

KNOWLEDGE.

See BONA FIDE PURCHASER; CONVEYANCE; FALSE REPRESENTATION; INSOLVENCY; JUDICIAL NOTICE; NOTICE.

LABOR.

See EMPLOYER AND EMPLOYER.

LABORER'S LIEN.

See INTERVENTION; MECHANIC'S LIEN.

LACHES.

A trustee in possession held not guilty of laches in failing to assert his rights, where not disturbed. 68 Cal. 116.

Plaintiff in a water-right case held not estopped by delay or laches. 69 Cal. 255.

Laches held to be a bar to specific performance. 69 Cal. 652; 76 C.1. 590.

Property obtained by fraud held not lost by plaintiff's laches. 71 Cal. 513.

Right to accounting held forfeited by laches. 74 Cal. 544.

A party in possession of land not guilty of laches in not bringing suit to remove a cloud thereon while undisturbed. 74 Cal. 493.

Failure to rescind promptly for fraud is such laches as will waive the objection. 78 Cal. 389.

There is no bar to specific performance for sale of land except the statutes of limitations. 80 Cal. 90.

See DELAY; EQUITY.

LAFAYETTE PARK.

See DEDICATION.

LAND.

See BOUNDARIES; DEED; MINING CLAIMS; PUBLIC LAND.

LANDLORD AND TENANT.

A tenant who violates his lease by subletting thereby terminates his lease. 68 Cal. 505. See also 71 Cal. 349.

Possession of land by a lessee is a notice to purchasers of his possible equities. 68 Cal. 611.

Liability of landlord for nuisance and damages. 69 Cal. 593.

Intervention by landlord in suit of ejectment against tenant. 69 Cal. 572.

The death of the landlord terminates without notice a tenancy at sufferance or at will. 70 Cal. 445; 81 Cal. 261.

A landlord in California has no lien for his rents. 71 Cal. 331.

Agreement for payment of rent from proceeds of wool held not to vest any title of wool in the landlord. 71 Cal. 331.

Under a lease to begin in future, the lessee is not entitled to present possession. 71 Cal. 46.

A mere licensee to work a mine does not create the relationship of landlord and tenant, whatever its terms. 71 Cal. 126.

A landlord is liable for injuries caused by reason of the negligence of his janitor. 71 Cal. 150.

The rule of the "law of the case" applies to contracts between landlord and tenant. 73 Cal. 329.

It seems the hostile acts of a tenant in repudiating his agreement may terminate his tenancy. 73 Cal. 329; 75 Cal. 342.

Assignees of an individual interest in a lease become liable on the covenant to repair and surrender up, but not for the rent to become due. 72 Cal. 498.

A surrender of a lease does not dissolve the tenancy, unless there is also a surrender of possession. 72 Cal. 498.

Where a lease gives the tenant the option of purchase, the covenants are mutual and dependent. 72 Cal. 217.

A certain allegation held not to be an averment of tender. 72 Cal. 217.

A verbal indefinite lease held not to be within the statute of frauds. 72 Cal. 307.

A tenant, except under section 1942 of the Civil Code, is not entitled to reimbursement for the value of repairs made by him. 72 Cal. 307; 76 Cal. 173.

A tenant while in possession is estopped from denying his landlord's title, or claiming adversely to him. 74 Cal. 590.

A landlord may maintain an action for the diversion of water as an injury to his inheritance. 75 Cal. 117.

Those who farm on shares become tenants in common. 75 Cal. 319.

It is doubtful if an assignment of an undivided interest in a lease will thereby cause the assignee to be liable to the original landlord for rent. 76 Cal. 126.

A lessee who has failed to get possession is justified in abandoning his contract. 76 Cal. 126.

Where a subtenant surrenders his lease to his landlord, he ceases to be liable for the original rent. 76 Cal. 126.

A tenant is bound to perform his covenant to restore the premises to the same conditions as existed when he entered. 76 Cal. 116.

A tenant for years may maintain an action for any injury that interferes with his possession, or the enjoyment of his property. 76 Cal. 11.

At common law the landlord was not bound to keep the property in any repair whatever. 76 Cal. 173.

Section 1941 of the Civil Code construed. 76 Cal. 173.

Where the possession is adverse, the relationship of landlord and tenant cannot exist. 77 Cal. 86.

Rent cannot be raised by mere notice, where the tenancy is for a fixed period. 77 Cal. 196.

Tenancy for a fixed period requires no notice to terminate it. 77 Cal. 196.

Acceptance of written lease need not be in writing. It may be shown by the tenant's acts. 77 Cal. 286.

Construction of lease; example of use not adverse. 78 Cal. 374.

A verbal license to mine is revocable at the will of the mine-owner; it does not constitute a lease. 78 Cal. 95.

A covenant not to assign a lease applies only to voluntary assignments. It is not broken by a compulsory assignment or a transfer by forced sale. 79 Cal. 575.

A purchaser of property leased from month to month may, without attornment, raise the rent. 79 Cal. 442.

The relation of tenancy may be shown in rebuttal of a claim of possession under a contract to convey. 79 Cal. 55.

Unless the lease contains a covenant to that effect, a landlord is not liable to his tenant or his tenant's employee for injuries caused by a defective stairway. 81 Cal. 58.

The possession of one who admitted being the tenant of another person cannot be adverse to such other person. 81 Cal. 261.

A notice to a tenant to quit may be signed by the landlord's attorney. 81 Cal. 540.

A landlord is not liable to a stranger for the results of a nuisance on the leased premises, unless the nuisance existed when the premises were leased, or was at that time liable to come into existence from the condition of the premises. 83 Cal. 217.

Where a lease provides for a re-entry after default, the receipt of back rent after notice of forfeiture will not waive such forfeiture. 84 Cal. 420.

Subdivision 1, section 1161, of the Code of Civil Procedure, construed. 84 Cal. 420.

A lease not delivered has no validity. 84 Cal. 21.

The fact that a party in possession under claim of title accepts a lease will not estop him from denying his landlord's title. 84 Cal. 21.

Neither title nor evidence of title can be shown in an action for unlawful detainer. 81 Cal. 540.

Instance where abandonment of a lease will be presumed. 82 Cal. 640.

The burden of proof rests upon the one in possession under an unrecorded lease, as against a *bona fide* purchaser, where the deed was recorded, to show that he was in open and notorious possession when the deed was executed. 82 Cal. 621.

A tenant who has no actual notice of a sale of the property is protected in paying rent to the original landlord. 82 Cal. 621.

One who does not enter into possession under a lease, but afterwards accepts it, is not estopped from disputing the landlord's title therein. 82 Cal. 1:5.

The fact that an insolvent lessee has abandoned his lease without cause will not permit the lessor to secure against his estate a claim for damages by such abandonment to a later date than that on which the petition of insolvency was filed. 83 Cal. 119.

The abandonment of the leased premises does not destroy the relation of landlord and tenant or discharge the lessee from his obligation to pay rent, although the lessor may rent the premises for the benefit of the original tenant. 85 Cal. 119.

A judgment in ejectment against a tenant is evidence in a subsequent suit against the landlord to show where the actual possession of the property was. The adverse possession of a landlord through his tenant is disturbed when the tenant is sued, even though the landlord be not made a party. 85 Cal. 156.

Under a lease providing that if the premises should become untenable from fire, no rent should be charged until they should be repaired, a tenant who, after such fire, elects by his conduct to waive such provision, cannot recover for damages sustained by water, caused by such want of repair. 86 Cal. 203.

If leased premises become unfit for occupation, the landlord is not liable in any event, until after the tenant gives him notice thereof. 86 Cal. 203.

Where a tenant has been fraudulently overcharged by the landlord, he may recover back the excess. 86 Cal. 433.

A landlord can only enter on rented premises for the purpose of making necessary repairs, unless such right is expressly reserved in the lease. 86 Cal. 298.

A landlord is liable for damages caused by his trespass on the leased premises. 86 Cal. 298.

Where the landlord's right to possession depends upon the forfeiture of the lease, the forfeiture clause must be strictly interpreted against him. 87 Cal. 34.

To give a landlord a right of re-entry for non-payment of rent, a demand for the rent upon or after the last day on which the tenant has to pay is essential. 87 Cal. 34.

An agreement to allow the rent to stand unpaid until a future month is a waiver of forfeiture for non-payment. 87 Cal. 34.

Where a lease contained an option of renewal and purchase, and the lease is renewed, omitting the option, but with the understanding that it shall continue, the option remains valid during the term of the second lease. 87 Cal. 323.

See FIXTURES; LEASE.

LABORER.

See CRIMINAL LAW.

LAUNDRY ORDINANCE.

See MUNICIPAL CORPORATIONS.

LAW COLLEGE.

See HASTINGS LAW COLLEGE.

LEASE.

An unexecuted oral change in a lease is not binding upon the grantee of the lessor. 68 Cal. 27.

A lease with a covenant for quiet enjoyment implies that the lessor has title. Such covenant is not broken except by eviction or dispossession. 70 Cal. 79.

Rent may be recouped by damages caused by breach of contract for quiet enjoyment. 70 Cal. 79.

Premises leased for a ferry may be recovered for failure to use it for such purpose. 71 Cal. 349.

Possession by mortgagee under a lease; adverse possession. 72 Cal. 307.

A lease giving an option to the landlord to compel the lessor to purchase improvements held assignable. 74 Cal. 287.

A finding that an agreement constituted a lease *in praesenti* held supported by the evidence. 74 Cal. 619.

A lease may be made to take effect at the expiration of another lease. 74 Cal. 619.

Instructions as to damages for breach of covenant held proper. 74 Cal. 619.

Provision against subletting and possession under lessee construed. 75 Cal. 325.

Essential allegations in a complaint against a lessee for failure to perform covenant to pay taxes. 75 Cal. 234.

A written lease of real property from a married woman must be acknowledged. 77 Cal. 89.

An assignment between a mining company and a miner to work a mine on shares (or "tribute") held not to constitute the relationship of landlord and tenant, even though the language is that of a lease. Under such an agreement, the parties become tenants in common in what is extracted. 80 Cal. 553.

A finding that the lease was "executed" does not imply delivery, and without delivery a written lease is invalid. 84 Cal. 21.

See FIXTURES; INSOLVENCY; LANDLORD AND TENANT.

LEGACY.

See PROBATE LAW.

LEGISLATURE.

See APPROPRIATIONS.

LEVY.

See ATTACHMENT; EXEMPTION; TAXES.

LIBEL.

In an action for libel, the complaint need not aver that the publication was not privileged. 69 Cal. 527.

Language actionable, and not privileged, is presumed to be false and malicious. 69 Cal. 527.

A writing charging a pupil with unwomanly conduct held libelous. 69 Cal. 527.

Failure to file cost undertaking as required by the act of 1871 does not deprive the court of jurisdiction. The bond may be filed after suit has been commenced. 69 Cal. 527.

An attorney who makes certain written charges in court, against the discharge of an insolvent on behalf of his client, cannot be held for libel. 69 Cal. 625.

The question as to whom the libel referred is for the jury. It is error to allow a witness to testify thereto. 71 Cal. 194.

Indictment for libel held sufficient against *habens corpus*. 73 Cal. 120.

If one composes, a second writes, and a third publishes, all are liable as publishers; the provisions of the constitution in regard to prosecutions for libel construed. 73 Cal. 121.

The jury held bound by the law in libel. 71 Cal. 194.

See CRIMINAL LAW; DAMAGES; SLANDER.

LICENSE.

Oakland laundry license held valid. 68 Cal. 635.

San Francisco liquor licenses held valid. 69 Cal. 608; 69 Cal. 58; 70 Cal. 35; 70 Cal. 59.

The appointment of a license collector held valid. 70 Cal. 458.

License tax not a penalty, but a debt. 71 Cal. 242.

License ordinance, publication of. 71 Cal. 242.

Ordinance not passed at regular session invalid. 71 Cal. 242.

A voluntary payment of illegal tax makes it not recoverable. 68 Cal. 575; 71 Cal. 466.

An ordinance requiring a license for the peddling of all goods not made in this state, without requiring a license for the goods made in this state, is unconstitutional. 71 Cal. 204.

A right of way by license is not by prescription. 71 Cal. 456.

A license to enter will not be implied from a contract to purchase. 70 Cal. 40.

Gates on a roadway are strong evidence of a user by license. 70 Cal. 454; 82 Cal. 153.

Lassen County sheep ordinance declared unconstitutional. 72 Cal. 387.

Eureka license ordinance held constitutional. 73 Cal. 632.

Sufficiency of complaint for violation of license ordinance. 73 Cal. 365; 85 Cal. 208.

Mono County licence ordinance held valid. 73 Cal. 365.

The County Government Act authorizes supervisors to pass an ordinance fixing licenses for the transaction of business, and providing that suit may be brought in the name of the county. 86 Cal. 235.

The fact that a bank obtained a lease to transact business from the bank commissioner will not release it from liability to pay a county license tax. 86 Cal. 255.

Uniformity of taxation does not prohibit the imposition of a license upon a particular business. 73 Cal. 365.

A tax collectible in the name of the people cannot be sued for in the name of the county. 77 Cal. 541.

A statutory remedy must be exclusively pursued. 77 Cal. 541.

An oral license to mine indefinitely is revocable at will. 78 Cal. 95. But see 81 Cal. 584.

A parol license for a party-wall is revocable when. 81 Cal. 584.

Existence of gates on a road as evidence of user by license. 82 Cal. 153.

See ADVERSE POSSESSION; CONSTITUTIONAL LAW; EASEMENT; JUSTICES' COURTS; MUNICIPAL LAW; PUBLIC OFFICERS; RAILROAD.

LIEN.

Mortgage lien on a seat in the San Francisco Stock and Exchange Board. 68 Cal. 254.

Lien on thrashing-machine under act of March 12, 1889. 75 Cal. 199.

Equitable lien on shares of stock for advances. 79 Cal. 323.

A certain contract to take water for land held to operate as a lien on such land. 80 Cal. 114.

Recording of water agreement held to be notice of the lien thereby created. 80 Cal. 530.

See APPEALS; ATTACHMENT; INJUNCTION; HIGHWAY; MECHANIC'S LIEN; PLEADINGS; PLEDGE; STREET ASSESSMENT; MORTGAGE.

LIEU LANDS.

See PUBLIC LANDS.

LIMITATIONS.

See STATUTES OF LIMITATION.

LIQUORS.

See CONSTITUTIONAL LAW; LICENSE; MUNICIPAL CORPORATIONS.

LIS PENDENS.

Up to May, 1872, notice of *lis pendens* did not apply to actions in ejectment. 71 Cal. 470.

Notice of *lis pendens* cannot operate against an independent title. 77 Cal. 52.

Effect of notice of *lis pendens* in foreclosure suits. 79 Cal. 115.

The effect of a notice of *lis pendens* is not ordinarily destroyed by an amendment to the complaint. 87 Cal. 581.

The effect of a notice of *lis pendens* against a lessee under a judgment of condemnation of land. 87 Cal. 253.

LOCATIONS.

See MINING CLAIMS; WATER AND WATER RIGHTS.

LOS ANGELES.

See CONSTITUTIONAL LAW; MUNICIPAL CORPORATIONS.

LOTTERY TICKET.

See SEARCH-WARRANT.

LIFE INSURANCE.

See BENEFICIAL ASSOCIATIONS; INSURANCE.

MACHINERY.

See FIXTURES; MECHANIC'S LIEN.

MALICIOUS ATTACHMENT.

See ATTACHMENT.

MALICIOUS MISCHIEF.

See CRIMINAL LAW.

MALICIOUS PROSECUTION.

Advice of counsel is no defense, if the defendant did not believe the accused guilty. 77 Cal. 434.

A verdict of \$750 for malicious prosecution held not excessive. 68 Cal. 381.

A verdict of four thousand dollars, where the defendant was never confined, held excessive. 70 Cal. 201.

Malice and want of probable cause must exist; the burden of showing want of probable cause is on plaintiff. 71 Cal. 89.

Evidence held to show probable cause. 71 Cal. 89.

Advice of counsel is sufficient, if the action is in good faith. 71 Cal. 89.

Nonsuit for alleged failure to show want of probable cause held improper. 72 Cal. 486.

Being held to answer is not conclusive proof of the existence of probable cause. 75 Cal. 287.

Instructions in a suit for malicious prosecution in a civil action. 68 Cal. 151.

The statute of limitations does not begin to run against a claim of damage for malicious prosecution on an unfounded claim, until the suit has terminated. It is otherwise in the case of an illegal and malicious attachment. 84 Cal. 89.

Injury to the plaintiff's feelings, caused by the arrest, may be proved under the general allegation of damage. 87 Cal. 629.

An action lies for the malicious prosecution of a person on the charge of insanity. 87 Cal. 192.

A certified copy of the entries in a justice's docket is *prima facie* evidence of the facts stated, and admissible in an action for malicious prosecution. 87 Cal. 629.

See DAMAGES.

MANDAMUS.

Mandamus will not lie to compel the superior court to restore a case to its calendar, in the trial of which, it failed to file findings. 69 Cal. 244.

Mandamus lies to compel the superior court to hear a proceeding for contempt. 70 Cal. 211.

Mandamus will lie to compel a board of trustees to levy a tax. 71 Cal. 310.

Mandamus will not lie to compel a public officer to permit a citizen to inspect a record without some beneficial interest in it. 71 Cal. 43.

Mandamus will not lie to compel a superior judge to issue subpoenas to witnesses to appear before the United States land-office. 72 Cal. 280.

Mandamus will not lie to review the dismissal of contempt proceedings. 72 Cal. 96.

The correctness of a bill of exceptions can-

not be tested in *mandamus* proceedings. 84 Cal. 231.

The proper remedy for a refusal to settle a bill of exceptions is *mandamus*. 83 Cal. 83.

Mandamus will lie to compel a justice of the peace to issue an execution. 73 Cal. 54.

Mandamus against the treasurer of Sacramento. 74 Cal. 224.

Mandamus will not lie to compel a superior court to admit certain evidence in a trial on appeal. 75 Cal. 114.

Mandamus in contempt proceedings held not proper. 75 Cal. 580.

Mandamus lies to compel a board, tribunal, or officer to do an act which he has refused to do, and which the law intended to be final, and where there is no other plain, speedy, and adequate remedy in the ordinary course. 76 Cal. 545.

Mandamus, generally, against a public officer. 76 Cal. 269; 76 Cal. 569.

Pleadings must show why application was not made to the superior court. 77 Cal. 34.

Mandamus will lie to compel the controller to pay appropriation to a county for indigent aged persons. 77 Cal. 133.

Mandamus held not to lie to a county treasurer in a certain case. 78 Cal. 493.

Mandamus will not lie to settle a premarital statement on motion for new trial. 78 Cal. 107.

Mandamus will lie to compel a sheriff to execute a writ of execution from a justice's court. 79 Cal. 213.

Mandamus will not lie to compel the levy of a tax to pay municipal bonds, where the authority to issue them is lacking. 79 Cal. 383.

Mandamus held a proper remedy to compel the controller to draw his warrant for the state mining bureau. 80 Cal. 220.

Circumstances under which a right to a public office may be enforced by *mandamus*. 69 Cal. 460.

Mandamus will lie to compel a sheriff to restore the possession of premises ordered by the supreme court on appeal to be delivered to defendant, notwithstanding third parties had in the mean time taken possession under an independent title. 83 Cal. 384.

Mandamus lies against a school board to compel it to pay for supplies. 81 Cal. 542.

Mandamus to settle bill of exceptions. 82 Cal. 480.

Mandamus is the proper remedy to restore a teacher of the public schools to a right from which she is unlawfully excluded. 82 Cal. 480.

The title to real estate may be incidentally litigated in proceedings under *mandamus*, so far as the same involves possession. 87 Cal. 166.

A board of school trustees may be compelled to rebuild a school building which has been destroyed by fire, according to the expressed will of the electors. 87 Cal. 166.

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A tax-payer of a school district, whose children attend school, is a party "beneficially interested," so as to maintain a proceeding for a *mandamus* to compel a school board to comply with the instructions of the electors as to the location of a school site. 87 Cal. 166.

The existence of an equitable remedy does not deprive the party of the legal remedy of *mandamus*. 87 Cal. 166.

Mandamus will not lie to compel a judge to settle a bill of exceptions or statement, where the counsel failed to appear at the time fixed for the settlement. 87 Cal. 367.

Failure to serve a copy of the petition and writ upon the opposite party, as required by rule 28 of the supreme court, is ground for dismissing the petition. 87 Cal. 367.

MANSLAUGHTER.

See CRIMINAL LAW.

MAPS.

See BOUNDARIES; DEDICATION; DEEDS; EVIDENCE; STREET ASSESSMENT; TOWN SITE.

MARRIAGE.

Cohabitation and repute do not make marriage, but are only evidence of it. 82 Cal. 427.

Prior to the adoption of our Civil Code, consent alone constituted marriage. 82 Cal. 427.

Whatever be the character of the original relation, lawful or illicit, will be presumed to be continued. It will be presumed to have been lawful. 82 Cal. 427.

A change from lawful to illicit relation may occur between man and woman. The repute which, with cohabitation, will be proof of marriage must be uniform and general, established by the open, undisguised, and undoubted acts of the parties. The law, however, does not require the formal introduction, by a husband, of his wife to his social circles, but his conduct must justify her reception as such. 82 Cal. 427.

In criminal cases, marriage cannot be proven by mere evidence of cohabitation and repute. 82 Cal. 427.

In an action for breach of promise to marry, a release of the defendant's liability, apparently acknowledged before a notary, the notarial certificate is only *prima facie* true. The rule applicable to acknowledgments of married woman does not apply. 83 Cal. 270.

Instruction, in an action for breach of

promise of marriage held erroneous, as assuming a state of facts not in evidence. 83 Cal. 270.

An offer to prove the persons living together as husband and wife held not an offer to prove marriage. 70 Cal. 560.

An agreement to become husband and wife is not invalid because of a promise to keep the marriage secret until a future date. 75 Cal. 1.

A present consent followed by consummation is sufficient to constitute marriage. 75 Cal. 1; 79 Cal. 633.

Marriage is not such part performance as will take a contract, made in consideration of it, out of the statute of frauds. 77 Cal. 106.

Consent alone will not constitute marriage, under section 55 of the Civil Code. It must be followed by a solemnization or an assumption of marital rights, duties, and obligations. 79 Cal. 633.

Marriage as operating in the revocation of a will. 87 Cal. 645.

See CONTRACTS; DIVORCE; HUSBAND AND WIFE; PROBATE LAW.

MARRIED WOMEN.

See ACKNOWLEDGMENTS; CERTIFICATE; CONTRACTS; DEEDS; ELECTIONS; ESTOPPEL; HOMESTEAD; HUSBAND AND WIFE; LEASE; MARRIAGE; PROBATE LAW; WILL.

MASTER AND SERVANT.

See EMPLOYER AND EMPLOYEE.

MATERIAL-MEN

See HOMESTEAD; MECHANIC'S LIEN.

MECHANIC'S LIEN.

Where it is alleged that a defendant has some claim subordinate to that of plaintiff's lien, the answer of such defendant must not merely deny such subordination; it must disclose its nature and extent. 68 Cal. 323.

The name of the owner, and also the name of the person having the equitable title, may be stated in the notice of lien. 68 Cal. 323.

It is not necessary to state in a notice of lien that the structure has been completed. Abandonment of the project is equivalent to completion, as to a mechanic's lien. 68 Cal. 323.

Withdrawal of one suit before trial operates as a waiver of error in refusing a separate trial. 68 Cal. 262.

A jury trial may be properly refused in an action to foreclose a mechanic's lien. 68 Cal. 262.

An evasive answer as to the performance of work held to raise no issue. 68 Cal. 262.

A description of the property against which the claim was filed held sufficient for identification. 68 Cal. 262.

Denial "that defendant is entitled to any lien" held but a denial of a legal conclusion. 68 Cal. 262.

Materials furnished an original contractor are only a lien on a building to the extent that such contractor was unpaid when the lien was filed. 70 Cal. 28.

When a contractor, after procuring materials, abandons the contract and is paid in full, and the owner himself completes the work, the lien for such materials depends on the question whether the owner has completed it for less than the balance of the contract price. 70 Cal. 437.

Averment of non-payment, etc., in a suit to foreclose a mechanic's lien, held sufficient. 70 Cal. 614.

A mining superintendent who performs manual labor is entitled to a lien on the mine. 70 Cal. 614.

The giving of an order to a third person for the sum due, if not received as payment by the payee, nor accepted, nor paid, but returned, does not destroy the right of a lien for the amount. 70 Cal. 614.

Under section 1241 of the Code of Civil Procedure as it stood before amendment, a homestead was not subject to a mechanic's lien. 74 Cal. 356; 70 Cal. 187.

"Statement of terms, time given, and conditions of contract," held sufficiently stated. 72 Cal. 78.

A description given as the "Red Cloud" Mine, in Bolie mining district, Mono County, California, held sufficient. 72 Cal. 78.

Several contiguous mining locations operated as one mine are to be regarded as one mining claim, and the law requiring the amount against each, to be specified in order to secure priority, does not apply. 72 Cal. 78.

One who furnishes materials directly to the owner is not an original contractor. 74 Cal. 432.

A material-man must file his lien within thirty days of the completion of the building; a filing prior to such completion is invalid. 74 Cal. 273; 74 Cal. 432. But this rule does not apply to mining claims that have no definite time for completion. *California Powder Works Company v. Blue Tent C. H. G. M.*, decided October 8, 1889 (not reported).

A building partly erected by design, or incompleting because of abandonment of project, should be held "completed" when work stopped. 74 Cal. 432.

Finding that "the building had been

completed" held not supported by the evidence. 74 Cal. 432.

Under the mechanic's lien law of 1885, if the owner pays the original contractor in full, before the building is completed, he is liable for the claims of the material-men. 74 Cal. 356.

Attorney's fees, though no part of the costs, are necessary incidents to a suit to foreclose a mechanic's lien. 74 Cal. 532.

It is not prerequisite to an allowance for attorney's fees that plaintiff should have actually paid them. The amount is to be fixed by the court. 74 Cal. 532.

A material-man who has supplied a contractor, but who has filed no lien, is not entitled to a personal judgment against the owner of the building. 74 Cal. 625.

In an action to foreclose a lien for materials furnished a contractor, the complaint must aver that they were furnished for and used in the building. 75 Cal. 205.

A person who performs labor on a building at the request of a contractor is entitled to a lien thereon. 75 Cal. 205.

The contract stated in the lien and in the complaint must be the same. If one is express and the other implied, the variance is fatal. 76 Cal. 578. But see 55 Cal. 21.

The different liens of persons on various portions of a placer claim may be joined in one action by separate counts. 76 Cal. 578.

The notice of lien is to be liberally construed; the name of the employer held sufficiently stated. 76 Cal. 578.

Tools and machinery are regarded as affixed to a mining claim, and work on such tools by a blacksmith is work on the mine. 76 Cal. 585.

Where a miner works by the month, his employment does not end every month, so as to require the filing of a lien every month. 76 Cal. 578.

Where a contractor's contract is to furnish a certain number of laborers, he has a right to a lien for the money due to him for their labor. 76 Cal. 585.

A laborer's lien not filed within the time required by law is lost. 76 Cal. 508.

A notice of lien that totally fails to describe the premises to be charged with the lien is invalid. 77 Cal. 396.

A pump planted in the ground is a fixture within the meaning of the law of mechanic's lien. 77 Cal. 190.

Materials sold to a person ostensibly a superintendent of works will be presumed to be chargeable to the owner of the works. 77 Cal. 193.

A recorded mortgage, made to secure further advances, has priority over subsequent mechanics' liens. 77 Cal. 383.

Under section 1187 of the Code of Civil Procedure as amended in 1837, accept-

ance and occupation of a structure is conclusive evidence of its completion. 78 Cal. 193.

Where the failure to record a building contract makes it void, it is only so void as between the parties. It does not affect the right of a material-man or laborer to have a lien on the premises. 78 Cal. 193.

It is proper to make both the owner and the contractor parties to a foreclosure suit. All persons claiming liens should be made parties. 78 Cal. 193.

Attorney's fees are not costs, but are incident to foreclosure. A plaintiff is only entitled to attorney's fees when finally successful. 78 Cal. 193.

A lien which does not give the name of the owner or reputed owner is not invalid on its face; such name may be unknown. 80 Cal. 275.

In a foreclosure suit growing out of improvements made on land with the knowledge of the owner, it is not necessary to aver in the complaint that such owner did not post any notice of repudiation. 80 Cal. 275.

Sections 1185 and 1192 of the Code of Civil Procedure must be construed together. One applies to interest generally, and the other to all interests where the owners thereof do not repudiate by the posting of a notice. 80 Cal. 275.

Cart-hire may properly be estimated as part of the value of materials furnished. 80 Cal. 275.

In an unsuccessful appeal from a judgment of foreclosure, the superior court may order the lower court to allow attorney's fees for the services rendered in the supreme court. 80 Cal. 280.

A material-man who supplies a mine is entitled to a lien on the whole mine. 80 Cal. 510.

Where the original contract is entire, the material-man's lien need not be filed until the contract is completed. 80 Cal. 510.

A material-man must show that the materials were actually used in the structure on which he claims his lien. 80 Cal. 510; 83 Cal. 368.

The notice of repudiation required by section 1192 of the Code of Civil Procedure must be posted in a conspicuous place. 80 Cal. 510.

A mining claim is a structure within the meaning of the mechanic's lien law. 80 Cal. 510.

A recorder's indorsement is *prima facie* evidence of filing and date of recording. 80 Cal. 510.

Sufficiency of several complaints in a suit to foreclose a mechanic's lien commented on, and such complaints held sufficient. 82 Cal. 147.

Under sections 1183 and 1184 as they now stand, contracts for a price over one thou-

and dollars are void unless recorded; and if void, subcontractors, laborers, and material-men may enforce their liens, without regard to what is due the contractor, or the giving of notice to the owner. 81 Cal. 641; 81 Cal. 170.

No notice to the owner is required unless there is a valid contract between the owner and the contractor. 81 Cal. 170.

Where the contract is invalid, the material-men and laborers are deemed to have been employed directly by the owner, though they cannot recover a judgment against him personally. 81 Cal. 170; 81 Cal. 643.

Sufficiency of a subcontractor's complaint in a case where the original contractor's contract was void. 81 Cal. 641.

A subcontractor who purchases materials is the only party personally liable therefor. 81 Cal. 641.

The amendment of 1887, making homesteads liable to mechanics' liens, applies to all liens filed after its passage. 81 Cal. 641.

The amendment of 1887 to sections 1183 and 1184 of the Code of Civil Procedure do not affect contracts the price in which is less than one thousand dollars. 82 Cal. 42.

Work done on articles is work done on the structure, if they are affixed thereto. 82 Cal. 42.

A failure to find a quantity of land necessary for the use of the building is no ground for a reversal. 82 Cal. 42.

A mistake in the surname of the employer will not invalidate the lien, if identity is alleged and proven, and he is sometimes known by such name. 82 Cal. 144.

The notice of lien need not state that the job was separate, or the nature of the "alteration." 81 Cal. 144.

The notice of lien need not give an itemized account, nor state the value of the labor or materials. 81 Cal. 144.

The code does not require a lien to state implications of law, but facts. It requires only express agreements to be set forth, and if no time was agreed on, the time need not be given. 81 Cal. 144.

Under the amendment of 1887, providing that cessation from labor on a building for thirty days is equivalent to a completion thereof, the thirty-day period within which a material-man or laborer may file his lien begins to run from such cessation, and afterwards it is too late, although it be filed within thirty days from actual completion. 85 Cal. 80.

A statute which shortens the time within which a lien may be filed applies to pending cases of uncompleted buildings, and is not retroactive. 85 Cal. 80.

Section 1184 of the Code of Civil Procedure applies only to contracts in excess of one thousand dollars. 86 Cal. 22.

The bare fact that a material-man has filed

a lien for too much will not, in the absence of fraud, defeat his right. 86 Cal. 617; 86 Cal. 606.

Where one contractor succeeds another, and by unanimous consent assumes all liabilities, the material-man need not state in his lien how much has been furnished to each separately. 86 Cal. 617.

The only limit to a material-man's lien is the amount of the contract price in the hands of the owner when the lien was filed. 86 Cal. 617.

Slight evidence will justify a court in holding the notice of lien was filed in time. 86 Cal. 623.

A monument erected in a public park becomes a fixture, and is not subject to a mechanic's lien. 86 Cal. 606.

Where a building is erected subject to removal provided that all liens are paid, and the landlord pays off such liens to protect himself, he may insist that the amount of such liens be repaid before such removal. 85 Cal. 335.

If by mistake the parties fail to express their intention as to the right of removal of a fixture, the contract can be reformed, but not so as to prejudice the rights of a *bona fide* lien-holder. 86 Cal. 335.

A landlord who permits a building to be erected on his land, without giving the notice required under section 1192 of the Code of Civil Procedure, will be held responsible for the lien filed against the same. The fact that such buildings were not intended to be fixtures cannot relieve him from liability. 86 Cal. 335.

A lien is not invalid because it is not filed against a joint owner, of whose interest the claimant was ignorant. 86 Cal. 335.

An objection to a complaint that it is couched in terms of mere conclusions of law, and is otherwise uncertain, can only be raised by demurrer. 87 Cal. 589. See 78 Cal. 230.

Under sections 1183 and 1184 of the Code of Civil Procedure, whether a contract is recorded or not, the owner must, on notice, withhold from the contractor sufficient money to pay the material-man's claim. 87 Cal. 589.

The contents of the claim of lien may be pleaded by attaching a copy to the complaint, and making it part thereof. 87 Cal. 589.

A statement as to the value of the material furnished, and balance unpaid, held sufficient. 87 Cal. 589.

A judgment against the contractors for whom the materials were furnished is not necessary to support the lien of the material-man. 87 Cal. 589.

A finding, though couched in terms of conclusions of law, will support a judgment foreclosing the lien. 87 Cal. 589.

An omission or imperfection so slight that it cannot be regarded as a substantial part

of the original contract, but can be compensated for by a recongment for damages, will not defeat a claim for labor and services. 87 Cal. 508; 86 Cal. 613.

The interest of the landlord is subject to a lien for materials furnished at the request of the lessee, if he fails to give notice that he will not be responsible for the same. 87 Cal. 508.

The lien of a material-man takes precedence over a mortgage executed after the time when the materials were commenced to be furnished, even though such mortgage was to secure the purchase price under a previous deed. 87 Cal. 619.

The interest of a party who executes a contract for the sale of land is bound by the liens caused by the contracts of the vendee, unless he gives the notice required by the statute. 87 Cal. 619.

Where the contract of employment has neither time nor terms, other than what is mentioned in the notice of lien, it is sufficient. 82 Cal. 144.

A miner who labors on a mine, for a person who operates such mine under a contract with the owners to make certain improvements for a certain interest therein, is entitled to a lien on the mine for his wages. 80 Cal. 510.

Where issue is taken on the promise to pay and the amount due, the findings must cover both issues. 83 Cal. 368; 83 Cal. 373.

The words "mining claim" include mining ground and all mines, whether the title thereto is inchoate or perfect, but cannot extend to non-mineral adjoining land. 83 Cal. 368.

There can be no lien for materials not actually used on a mining claim. 83 Cal. 373.

A mortgage executed prior to a lien may be attacked on the ground that it was made to hinder, delay, or defraud creditors. 83 Cal. 368.

MEMORANDUM OF COSTS.

See COSTS.

MERCHANT.

See CUSTOM; INSOLVENCY.

MEXICAN GRANT.

Action to subject land to administration. 68 Cal. 445.

Conclusiveness of decree of confirmation. 69 Cal. 160.

Floating grants and overlapping patents. 69 Cal. 160.

Patent from the United States as evidence of the extent of. 69 Cal. 122.

A patent to the Central Pacific Railroad for land embraced in a Mexican grant is void, it being, in effect, a government "reservation." 79 Cal. 130.

Patent to representatives of a deceased holder held to be in trust. 79 Cal. 490.

The fraudulent character of a grant claimed to be the oldest may be shown by proof that it bears a false date or was not noted in the official archives, and also by the impeachment of the witness who pretended to have signed the same. 84 Cal. 617.

The statute of limitation does not run against a party claiming under a trust, to a Mexican grant, until after the trustee has repudiated. 85 Cal. 436.

See BOUNDARIES.

MILITARY RESERVATION.

See POINT SAN JOSE MILITARY RESERVATION.

MINING CLAIMS.

The business of hydraulic mining is not *per se* unlawful. 79 Cal. 239.

In a suit under section 2326 of the Revised Statutes of the United States to determine the right of possession, after application for patent, each plaintiff must allege and prove citizenship. 68 Cal. 43. See 72 Cal. 528.

The sufficiency of marking the boundaries of a location is a question of fact for the jury. 70 Cal. 226.

The dissolution of an agreement to make locations for mutual benefit ends all duties thereunder. 70 Cal. 121.

The rules as to improper cross-examination apply to contests over mining claims. 70 Cal. 226.

A suit against hydraulic mining, where the answer sets up and proves twenty years' user, and that plaintiff had voluntarily located his property, and became affected by such user, held properly decided against defendant. 71 Cal. 231.

Answer in a complaint for an injunction against working a mine held to be but conclusions of law. 71 Cal. 126.

A relocation of a mining claim by the same persons does not operate as an abandonment of the first location. 72 Cal. 528.

Minors who are native-born are citizens competent to make mining locations. 72 Cal. 528.

In the absence of a custom requiring it, the recording of a notice of location is not necessary, and where such a custom exists, it

may be recorded before being posted. 72 Cal. 528; 73 Cal. 543.

A location is not invalid because it is in excess of what the law allows. 72 Cal. 528.

In an action not apparently under section 2326 of the Revised Statutes of the United States, the plaintiff need not allege his citizenship. 72 Cal. 528.

A "mineral lode" is a zone or belt of mineralized rock lying within the boundaries clearly separating it from the neighboring rock, but does not include gravel. 73 Cal. 109.

The discovery of mineral is not a prerequisite to a placer location. 73 Cal. 109.

A local custom requiring notices of location to be posted before recorded is binding. 73 Cal. 109.

Land held under a valid location and requisite work is not subject to relocation by anyone. 73 Cal. 541; 80 Cal. 348.

Naked priority of possession of mining ground is not valid against one who has complied with the mining laws. 73 Cal. 543.

A location is not rendered invalid because its monuments were by mistake placed inside the limits of an adjoining claim. 73 Cal. 21.

Annual work required by section 2324 of the Revised Statutes applies to placer claims as well as to quartz. 73 Cal. 520.

The owner of a lot under a town-site patent issued before 1872, and in which a ledge of auriferous quartz was known to exist, has an absolute title to all the lot except the quartz ledge. 73 Cal. 477.

A parol permission to run a tunnel through a town lot, if made without consideration, is revocable. 73 Cal. 477.

Section 2338 of the Revised Statutes of the United States relative to easements for drainage of mines, etc., is not a reservation in favor of mining. 73 Cal. 482.

Section 1238 of the Code of Civil Procedure does not authorize the condemnation of a right of way for the private use of a miner. 73 Cal. 482.

Where a mining location is made for a person without his consent, his subsequent ratification, express or implied, renders it valid. 72 Cal. 528.

Where veins unite below the surface, the oldest location is entitled to the vein below the point of junction. 75 Cal. 78.

Property cannot be condemned for such private use as the working of mines. 73 Cal. 485.

An injunction ought not to issue to restrain the working of a mine, where the defendant neither worked such mine nor threatened to do so. 75 Cal. 78.

The owners of adjoining claims have the exclusive ownership of the ledges included within their end lines. 75 Cal. 78.

Where a claim has become open to loca-

tion, resumption of work before a hostile relocation has been completed preserves the title. 75 Cal. 284.

It is doubtful if entry by stealth, at one o'clock of a new year's morning, can be the basis of a valid relocation under section 3224 of the United States Revised Statutes. 75 Cal. 287.

A person claiming land patented to the Central Pacific Railroad Company, under a mineral location, may show that at the date of the patent the land was known to be more valuable for mining than for agricultural purposes. 75 Cal. 194.

A patent to the Central Pacific Railroad Company, of a tract of land which by its terms excepts "all mineral portions," is not conclusive evidence that the land is non-mineral, and the mineral claimant may show its mineral character, in an action to quiet title. 75 Cal. 194. See 78 Cal. 295.

An agreement to locate mining claims for joint benefit need not be in writing. If such locations are made in the name of only one of the parties, he holds the title in trust. 77 Cal. 10.

A claim is not "distinctly marked on the ground" by the reference in the notice of location to its legal subdivisions, even if the claim be a placer location. 78 Cal. 593; 83 Cal. 296.

The purposes of the requirement of marking locations is to inform other prospectors as to what ground is occupied. They do not take surveyors with them, and it would do them no good to be merely informed by reference to section lines, because such section lines may not be distinctly marked on the ground. 78 Cal. 596.

A location by marking the corners of the end lines and the placing of a stake or blazed tree at each corner, and a partial brushing out, to admit of a person passing through, together with the fixing up of a proper notice in the center of the claim, defining its boundaries, held a sufficient mining location under the statute. 78 Cal. 543.

A location on land already located is invalid, no matter how perfect. 78 Cal. 543.

An agricultural patent that contains no mineral reservation is conclusive of the character of the land in an action at law. 78 Cal. 235. But see 82 Cal. 104; 83 Cal. 101; 83 Cal. 539.

A verbal license to mine for an indefinite time is revocable at the will of the licensor. It does not create the relation of landlord and tenant. 78 Cal. 93.

To constitute a reservation of a gold mine from a town-site patent, there must be a mine that can be worked at a profit, and the land must have been known to be more valuable for mineral than for agricultural purposes, at the date of the patent. 81 Cal. 44.

Allegations that the mine was reserved

from the patent, and is part of the public mineral land of the United States, are mere conclusions of law. 81 Cal. 44.

Burden of proof where a party claims a quartz ledge within a town site, under a location made after the date of the town-site patent. 81 Cal. 44.

The purchase price of a mining claim not evidence of its value. 81 Cal. 44.

In a suit for the possession of a mining claim, the complaint must aver either ownership, or all the facts showing it. 80 Cal. 348.

Notices of location should be liberally construed. 83 Cal. 187.

The failure to mark the boundaries of a location is fatal to its validity. The mere giving of the section numbers is insufficient. 83 Cal. 296.

A written "grub-stake" contract construed. 79 Cal. 62.

Under section 2326 of the Revised Statutes of the United States, each party must allege and prove his right to a patent against the government, as well as against his adversary. 83 Cal. 296.

If the center line is sufficiently described, it is sufficient to state that the claim is for a specified number of feet on each side of such line. 83 Cal. 187.

A natural monument from which a starting-point is located will be presumed to be known or ascertainable. 83 Cal. 187 (citing 130 U. S. 299).

A mining claim known under a certain name may be so described in a deed, and parol evidence is admissible to explain and locate it. 83 Cal. 187.

If a mining claim is abandoned, it may be relocated by any citizen. 83 Cal. 187.

The owners of two adjoining mining claims held in common have a right to perform all assessment work necessary to hold both claims on any one. 83 Cal. 163.

The rule that ownership will be presumed from actual possession applies to mining claims. 83 Cal. 163.

A substantial compliance with the statute requiring the end lines of mining claims to be parallel is all that is required; but a location may be so irregularly made as to destroy the right to follow the vein beyond the surface lines. 83 Cal. 203.

Corporated mining property cannot be conveyed without the consent of the holders of two thirds of the capital stock. 80 Cal. 310.

The term "mining ground" includes the ditches used appurtenant thereto. 80 Cal. 310.

A lease of certain mining-ground held to be but an agreement to work the mine on "tribute." 80 Cal. 553.

An alien's declaration of intention to become a citizen must precede his mining location, to render it valid. 83 Cal. 296.

Recording or posting of a location notice

is not required by the United States statutes, and when not required by local customs is unnecessary. 83 Cal. 296; 83 Cal. 188.

Such notice need not state the district, county, or state. 83 Cal. 193.

A contract between several persons by which they shall locate placer claims in the name of third persons who are mere "dummies," and will convey to them after location, contemplates a fraud on the government, and is void as against public policy. 84 Cal. 409.

All equities prior to the location on which a patent was issued are lost by the claimant joining in such location. 84 Cal. 409.

In an action to quiet title to a mining claim, where the defendant claims only the right to follow his vein on its dips and angles from contiguous land under the premises described in the complaint, the judgment should be as on disclaimer, saving the right claimed by defendant. 83 Cal. 589; 83 Cal. 613.

See CORPORATIONS; EASEMENTS; MORTGAGE; QUIETING TITLE.

MISTAKE.

Where no third party's rights are involved, a deed may be reformed because of a mutual mistake as to the interest owned by the grantor; such mistake relates to the date of the agreement, and not to the time of delivery. 83 Cal. 155.

Land conveyed by mistake in a deed belongs equitably to the grantor, and he may defend by setting up such mistake in ejectment. 75 Cal. 155.

In an account stated, an error therein must be pleaded as in other cases on contracts. 75 Cal. 566.

Ordinarily, a written instrument will not be reformed for mutual mistake, when one party knew of the insertion and the other might have readily understood it had he read the instrument. 75 Cal. 513.

In an action to reform an instrument, relief will not be refused merely because there is a conflict of evidence. 73 Cal. 452.

Where a married woman executes a mortgage on her homestead, under a mistake as to the law and her liability for her husband's debt, and which mistake was mutual as between her and the mortgagee, such mortgage is wholly invalid. 85 Cal. 610.

Mutual mistake as a ground for intervention in a creditor's suit. 85 Cal. 488.

A judgment reforming a declaration of trust proceeds on the theory that that which ought to have been done was done, and gives it force and effect as if done. 85 Cal. 488.

A mutual mistake may be revised on the application of the party aggrieved, so far as

it can be done without prejudice as to the rights of third persons. 85 Cal. 488.

See DEEDS; DEFAULT; EQUITY; EJECTMENT; FRAUD; HIGHWAY; MORTGAGE; PLEADING.

MONTGOMERY-AVENUE ACTS.

A petition of the majority of the frontage owners was essential to give the board of works jurisdiction under the act. 79 Cal. 388.

The bond-holder is charged with knowledge of the facts conferring jurisdiction to proceed. 79 Cal. 388.

Validity of an assessment under the statute of 1871-72 in relation to sewer construction. 82 Cal. 11.

MORTGAGE.

A mortgagee has no estate in the mortgaged land subject to attachment. 68 Cal. 566.

A debt secured by mortgage can only be attached by garnishment. 68 Cal. 566.

Under the evidence, deeds held not to be mortgages. 68 Cal. 404; 70 Cal. 465; 80 Cal. 446.

Under the evidence, deeds held to be mortgages. 71 Cal. 407; 72 Cal. 307; 80 Cal. 323; 75 Cal. 271; 79 Cal. 34.

A contract to extend the time for payment of a note secured by a mortgage held to be a renewal of both note and mortgage, under section 2922 of the Code of Civil Procedure. 68 Cal. 52.

After a mortgage debt has been allowed against an estate, the statute of limitations ceases to run against it. 68 Cal. 52.

Description of land in a mortgage held sufficient. 68 Cal. 374.

A mortgagor is estopped from claiming that his mortgage is void for uncertainty in description. 68 Cal. 374.

The statute of limitation does not commence to run against a judgment when it is modified by the supreme court, until such modification. 68 Cal. 491.

A complaint in foreclosure held not ambiguous. 68 Cal. 491.

Motes in which proceeds of foreclosure sale should be applied. 68 Cal. 236.

Finding as to authority of an alleged attorney in fact held to be insufficient to sustain the judgment. 68 Cal. 156.

A trustee to whom a mortgage has been assigned may be joined with the mortgagee as plaintiff, in foreclosure. 68 Cal. 419.

The failure of a grantee to pay off a mortgage as he agreed to will not defeat his conveyance. 69 Cal. 611.

A mortgage executed by the president and

secretary of a corporation, under seal, is presumed to be authorized. 70 Cal. 144.

Counsel fees cannot be recovered against a corporation in foreclosure, unless the resolution authorizing the mortgage so provided. 70 Cal. 144.

Where trust funds have been improperly used to satisfy the mortgage of the trustee, the beneficiary is entitled to have the mortgage lien revived in his favor. 70 Cal. 128.

A married woman may mortgage her separate property to secure the debts of her husband. 70 Cal. 250.

A person who sets up a claim to the land adverse and paramount to that of the mortgagor is not a proper party in a suit to foreclose the mortgage. 71 Cal. 418. See 75 Cal. 134.

Where a married woman mortgages property held in her name, but purchased with community funds, and such mortgage is foreclosed in a suit in which she and her husband are joined as defendants, the husband is not estopped from afterwards claiming that the property is community property. 71 Cal. 418.

A mere error in the date of the note secured by the mortgage does not affect the foreclosure. 71 Cal. 142.

Every transfer other than a trust, made only as a security, is deemed a mortgage, and the intent of the parties may be proven by parol. 71 Cal. 407.

An instrument in the form of a deed is presumptively a deed. 70 Cal. 466.

The test by which an instrument is determined to be a deed or a mortgage is, Was it given as a security for a loan of money? Such a debt may be created to take effect either in the past, present, or future. 71 Cal. 407; 72 Cal. 307; 80 Cal. 323.

Great inequality in the consideration is a circumstance tending strongly to show that a deed absolute on its face was a mortgage. 71 Cal. 407.

In an action for accounting between a mortgagee in possession and the mortgagor, held that the items were properly allowed. 71 Cal. 407.

Where the mortgage is executed by the husband alone, upon property claimed by him and his wife as a homestead, the wife is a proper party defendant. 71 Cal. 504.

Measure of damages for conversion of property held under a chattel mortgage. 71 Cal. 68.

Where a married man executes a mortgage, and afterwards files a declaration of homestead on the premises, his wife is a necessary party to the foreclosure suit, or she cannot be affected by the writ of assistance. 71 Cal. 479.

A deed intended to be a mortgage conveys neither title nor right of possession. 72 Cal. 307.

An agreement between the mortgagor and

mortgagee in possession, relative to the application of rents, held valid. 72 Cal. 110.

The statute of limitation does not begin to run in favor of a mortgagee in possession while he is paying rent or not holding adversely. 72 Cal. 307; 73 Cal. 291.

A mortgagor may bring suit to redeem from the mortgagee in possession at any time, unless the mortgagee has held adverse possession for five years after a breach of a condition in the mortgage. 72 Cal. 307; 73 Cal. 291.

Knowledge of a mortgagor that a mortgagee in possession has made valuable improvements, in the belief that there would be no redemption, does not operate as an estoppel. 72 Cal. 307.

Satisfaction of mortgage on the margin of the record should be in the form of the statute (Civ. Code, sec. 2938); and when so entered it discharges the lien, but does not necessarily discharge the indebtedness; a mortgagee may discharge his mortgage for any reason satisfactory to himself. 72 Cal. 457.

Sufficiency of notice of an election to consider the whole mortgage due after default in payment of interest. 72 Cal. 568.

A greater sum than that specified in the mortgage should not be allowed as counsel fees. 72 Cal. 568.

A court has jurisdiction, even as against the request of the mortgagor, to sell several lots in one parcel. 72 Cal. 259.

For the purpose of taxation, the mortgage is to be considered as an interest in the mortgaged premises. 72 Cal. 34.

A mortgage on land on which there is machinery, included therein as a fixture, is not affected by a subsequent sheriff's sale of said machinery, in a suit against the mortgagor. 73 Cal. 153.

A divorced wife may execute a mortgage on property deeded to her by her husband, and which was previously their homestead. 73 Cal. 271.

In an action to reform a certificate to a mortgage executed by a married woman, the notary is not a necessary party. 73 Cal. 452. See 74 Cal. 271.

The statute of limitation does not run against a right to reform a mortgage, pending an appeal from an order refusing to allow an amendment to a complaint praying for such reformation. 73 Cal. 452.

Under an agreement giving the right to redeem, an action for specific performance is, in effect, an action to redeem. 74 Cal. 351.

A complaint to reform a mortgage and enforce it states but one action. 73 Cal. 452.

Where in a foreclosure suit the second mortgagee appeals, but does not make the plaintiff a party to his appeal, and a new trial is ordered, such new trial cannot affect the plaintiff, who had not been made a party to the appeal. 74 Cal. 219.

Where the complaint contains a copy of the note and mortgage, and the answer is unverified, the due execution of the instruments is admitted. 74 Cal. 409.

Recitals in a mortgage must be held as true between the parties. 74 Cal. 409.

The title of a purchaser at a foreclosure sale relates back to the date of the mortgage. 74 Cal. 512.

The interest of a mortgagor in the land cannot be strengthened by his allowing the land to be sold for taxes and by purchasing at the tax sale, or by buying from a purchaser of the tax title. 74 Cal. 512.

A sheriff's deed under a foreclosure sale is not void because it refers in part, for a description of the property, to certain public records of the county. 74 Cal. 468.

A mortgage executed by a married woman is invalid unless certified and acknowledged according to law. 74 Cal. 345.

A surety is entitled to foreclose a mortgage given to secure his liability as such surety. 74 Cal. 409.

In an action to quiet title against the mortgagee in possession, by the mortgagor, the court may impose, as a condition for the decree, that the mortgage debt be paid, even though it be barred by the statute of limitations. 75 Cal. 271.

Adverse interests cannot be properly litigated in a foreclosure suit. Yet if so litigated, the judgment is not void. 75 Cal. 134.

Sale of a part of the mortgaged property as each installment falls due. 77 Cal. 612.

Complaint in foreclosure, where the principal became due under an option to so regard it on default of payment of interest. 77 Cal. 345.

The fact that a mortgagee of a growing crop hauled it to a warehouse for the mortgagor will not defeat his lien. Where a sale is made to the mortgagee while in possession, no further delivery to him is necessary. 77 Cal. 241.

Where a mortgage covers several lots, the mortgagor may foreclose on any one of them, provided he does not seek a personal judgment. 77 Cal. 54.

A foreclosure sale passes only the interest, whatever it may be, of the mortgagor. 77 Cal. 461.

Where husband and wife mortgage their homestead, and the husband is afterwards declared insolvent, the mortgagee may foreclose without presenting a claim against the insolvent's estate. 76 Cal. 229.

A mortgage made in good faith to secure future advances has priority, if recorded, over subsequent mechanics' liens. 77 Cal. 383.

A parol trust may attach to a mortgage so that a party shall hold it in part for his own benefit, and in part for the benefit of another. 77 Cal. 383.

Cross-complaint by mortgagee in possession against ejectment suit. 77 Cal. 548.

Where a mortgage debt is due in installments, a decree is proper that provides for a sale of so much of the mortgaged premises as may be necessary to pay the installment due. 77 Cal. 612.

A sheriff's deed under foreclosure to a ditch does not pass the title to such portions as have been constructed during the progress of the suit. 75 Cal. 404.

A divorce decree cannot affect the interests of a mortgagee in possession of the community property. 75 Cal. 434.

A judgment in foreclosure against a widow as executor cannot affect her individual rights to the premises. 75 Cal. 332.

A foreclosure sale is not affected by the fact that the judgment has been modified on appeal on a point not affecting the sale. 75 Cal. 373.

A mortgage of personal property, though void as against creditors and subsequent purchasers, is valid as between the parties. 76 Cal. 537.

If a mortgage is on both real and personal property, both may be sold under a single decree of foreclosure, and pass by the sheriff's deed. 76 Cal. 537.

A wife who mortgages her property to secure her husband's debt is a surety merely. 77 Cal. 54.

A purchaser with notice of mortgaged property, pending the foreclosure is bound by the decree. 78 Cal. 153.

A mortgage of corporate property is invalid, unless authorized by a resolution of the board of directors when duly assembled. 78 Cal. 629.

An action to redeem from a deed intended as a mortgage is, in effect, an action to remove a cloud on the title. Such action may be brought at any time while the mortgagor is in possession of the land, upon payment of what is due. 79 Cal. 34.

In the foreclosure of a mortgage executed by an agent, the principal is a necessary party. 79 Cal. 115.

A notice of *lis pendens* charges the purchaser at a foreclosure sale with notice of all the matters litigated. 79 Cal. 115.

Agreement as to an increased bid on certain property held not fraudulent. 79 Cal. 517.

Application of rents and profits under an agreement construed. 79 Cal. 342.

A mortgage on a mining claim, with the appurtenances, does not cover an adjoining parcel by their being subsequently worked in common. 87 Cal. 178.

An order appointing a receiver in a foreclosure suit must be construed with reference to the pleadings on which it is based. 87 Cal. 178.

In a suit to foreclose, the answer of a subsequent mortgagee, which sets up a junior

mortgage and prays for a foreclosure, must be treated as a cross-complaint and served on all parties. 87 Cal. 151.

An objection that the court was not authorized to add a percentage to the costs and disbursements cannot be considered for the first time on appeal. 87 Cal. 158.

No averment is necessary as to what is reasonable attorney's fees. 87 Cal. 161; 72 Cal. 571.

A mortgagor of land is not absolutely forbidden by section 2889 of the Civil Code from conveying his title in the mortgaged premises to the mortgagee, where the sale is fair, free from undue influence, oppression, or fraud, and for an adequate price. 85 Cal. 365.

A note indorsed in blank is payable to bearer, and may be negotiated by delivery alone, and a mortgage securing such note is a mere incident of the debt. 85 Cal. 304.

A decree which makes no provision of docketing a judgment for any deficiency is not a personal judgment against the defendant. 85 Cal. 280.

Proof of authority of an agent to release a mortgage. 85 Cal. 304.

In a suit to foreclose a mortgage, it is a jurisdictional allegation that the land sought to be foreclosed is situated in the county. 86 Cal. 197.

Where a mortgage provides that in case of any default in payment, the mortgagee may consider the whole amount due, failure to pay any installment will authorize him so to elect, provided he exercise his option promptly. 86 Cal. 197.

An allowance of counsel fees in the sum of \$150 is reasonable, where the amount of the mortgage is \$2,000. 86 Cal. 197.

Where the mortgaged land lies in two counties, it may be foreclosed by a suit brought in either of them. 86 Cal. 93.

A mortgage cannot be said to be foreclosed until the mortgagor's right of redemption is cut off. 86 Cal. 93.

Where a note and mortgage assigned as collateral has been surrendered by the assignee in consideration of a conveyance of the property without the authority of the mortgagee, such surrender may be afterwards ratified. In such case the debtor may elect either to hold him as a trustee, or treat him as having wrongfully converted the same. 85 Cal. 122.

A judgment against a defendant, deciding a certain conveyance fraudulent, is not evidence against any person not a party to the suit. 85 Cal. 542.

Adverse interests can be litigated in foreclosure suits only so far as to whether an interest is subject to the mortgage. 85 Cal. 283.

Where a party having a contract for a conveyance mortgages the land, and subsequently, on obtaining the deed, executes a

further mortgage to secure the purchase price, and the grantor has no notice of the prior mortgage, the mortgage to the grantor has priority. 85 Cal. 280.

Where the amount due on a mortgage is paid by a third person at the request of the mortgagor, a court of equity will keep the mortgage alive for his benefit. 85 Cal. 280.

The effect of conditional payment of one mortgage by another is to suspend the remedy on the old mortgage until maturity of the new one. The new one being not paid at maturity, the old mortgage revives, and has priority over all intervening encumbrances. 85 Cal. 280; a remedy in both equity and law exists for injury to the security. 80 Cal. 245.

A mortgagee in possession must, in a suit for redemption, account for the rents and profits, or the value of the use and occupation, and credit the same on the mortgage debt. 80 Cal. 132.

Effect of the reversal of a decree of foreclosure upon a purchaser *pendente lite*. 81 Cal. 11.

The trustees of a corporation cannot mortgage the corporate property to secure themselves, even though their claims are valid. 81 Cal. 303.

The recording of a mortgage is not necessary to its validity between the parties. 82 Cal. 471.

Proof of consideration is not necessary in a suit on a note and mortgage. 82 Cal. 471.

An adverse title to the mortgaged premises held by parties claiming by a conveyance prior to the mortgage, or by title paramount to the mortgagor, is not a proper subject for determination in a foreclosure suit. 83 Cal. 428.

Purchase of equity of pre-emption by joint mortgagees. 83 Cal. 30.

Property may be described by reference to the mortgage attached to the complaint. 83 Cal. 30.

Proceedings under a writ of assistance are not *res adjudicata* as against the remedy of ejectment. 83 Cal. 553.

The mortgaging of a whole lot, in fee, estops the mortgagor from asserting that any part of the estate is less than an estate in fee-simple. 83 Cal. 553.

Section 2957, Civil Code, declaring a chattel mortgage void unless recorded, is a substitution of the record for actual delivery required by section 3440, Civil Code. 84 Cal. 554. Such unrecorded mortgage may not be void as against creditors generally, but is certainly so as against those who attach the property in the possession of the debtor. 84 Cal. 554.

The dissolution, by insolvency proceedings, of an attachment on property included in an unrecorded chattel mortgage does not inure to the benefit of the mortgagees. 84 Cal. 554.

A separate action cannot be brought for the recovery of a debt secured by a mortgage, even though the security is worthless by reason of prior encumbrances. 84 Cal. 454.

As to whether a mortgage lien is merged is always a question of intent. 84 Cal. 295.

The purchaser at a foreclosure sale is, in equity, the assignee of the mortgage foreclosed, and a release of this equity is a sufficient consideration for the promise to pay. 84 Cal. 239.

Section 2922, Civil Code, requiring that a mortgage can only be created, renewed, or extended by a writing, does not preclude a mortgage on a growing crop from being extinguished by parol. 84 Cal. 201.

The court can only allow a reasonable attorney fee in foreclosure, whatever the stipulation. The allowance of excessive attorney fees will be corrected on appeal. 84 Cal. 201.

The description in a copy of the mortgage attached to the complaint as an exhibit is sufficient. 82 Cal. 635.

A sale of personal property by the mortgagee, under the authority of the mortgage, must comply strictly with law. 82 Cal. 199.

Issues as to the execution of a note and mortgage, and as to a homestead, though not equitable, are not separately triable by a jury. The action, being equitable, is triable by the court, who may pass on all incidental legal issues. 82 Cal. 471.

Exercise of option to purchase in a mortgage. 79 Cal. 342.

An action to foreclose a mortgage on the homestead of a decedent cannot be maintained unless the claim be first presented for allowance to the executor or administrator. 79 Cal. 7.

The wife may mortgage her separate property, or property which is but partly separate, because purchased with mixed funds. 70 Cal. 250.

An invalid mortgage may be the basis of an action to quiet title. 79 Cal. 297.

A deed which is a mortgage is a cloud on the mortgagor's title, which he may remove upon doing equity by redemption. 80 Cal. 348; 80 Cal. 132.

There can be but one action to enforce the same debt secured by several mortgages. Foreclosure as to one is a waiver as to the others. 80 Cal. 348.

An action to redeem may be brought at any time after the obligation becomes due, regardless of the running of the statutes of limitation against the principal obligation. 80 Cal. 132; 80 Cal. 348.

One who converts personal property subject to a chattel mortgage becomes liable for such mortgage, including interest and attorney fees. 80 Cal. 507.

One who, in purchasing mortgaged prop-

erty, promises to pay off the mortgage is liable for such promise. 80 Cal. 507.

A mortgagee whose security is impaired by the removal of fixtures has a remedy in both equity and law. 80 Cal. 245.

See CONTRACT; DECREE; EXECUTION; JUDGMENT; LIEN; NEGOTIABLE INSTRUMENT; PARTNERSHIP; PLEADING; PRACTICE; PROBATE LAW.

MOTION.

See PRACTICE; JUDGMENT; NOTICE.

MUNICIPAL CORPORATIONS.

Laundry license of San Francisco declared valid. 68 Cal. 294.

Rules for construction of ordinances are the same as those for the construction of statutes. 68 Cal. 294.

Laundry license ordinance of Oakland declared legal. 68 Cal. 635.

Power to impose license for carrying on business or for revenue. 69 Cal. 88.

Power to make police and sanitary regulations. 69 Cal. 88; 87 Cal. 162; 84 Cal. 304.

Validity of Los Angeles license ordinance. 69 Cal. 88.

Authentication of ordinances. 69 Cal. 88.

Publication of ordinance. 69 Cal. 88.

Fifty dollars per month liquor license held not unreasonable. 69 Cal. 88.

The right to term violations of an ordinance a misdemeanor may be given by charter. 69 Cal. 88.

Modesto laundry ordinance held constitutional. 69 Cal. 149.

Notice of proposal for city charter held sufficient. 70 Cal. 461.

Stockton liquor license ordinance held constitutional. 70 Cal. 35.

Liquor license ordinance held constitutional. 70 Cal. 35.

Act providing for classification of municipal corporations held constitutional. 73 Cal. 310.

Municipal corporations have no authority to punish for the same acts as are punishable under the Penal Code. 73 Cal. 142.

Stockton ordinance against visiting houses of prostitution held valid. 73 Cal. 228.

Eureka liquor ordinance held valid. 73 Cal. 632.

Stockton tax ordinance held valid. 73 Cal. 621.

San Francisco cow ordinance held valid. 72 Cal. 114.

San Francisco fire limit ordinance held constitutional. 72 Cal. 123.

City of Los Angeles held not liable for damages caused by the sudden overflow of its river. 72 Cal. 287.

Publication of ordinance held sufficient. 72 Cal. 125.

Ordinance of board of supervisors must be published in full, to be valid. 74 Cal. 578.

Pasadena ordinance prohibiting the sale of liquor held constitutional. 74 Cal. 20.

Santa Cruz water-works bonds held illegal, because premature. 74 Cal. 222.

The general powers of the board of supervisors do not extend to the issuance of bonds. 74 Cal. 332.

Special act establishing the Oakland police court held repealed by general law. 76 Cal. 436.

Special legislation defined. 76 Cal. 436.

Special charter of Berkeley construed. 84 Cal. 655.

The city and county of San Francisco can only make such sanitary regulations as are not in conflict with general laws. 84 Cal. 304.

Order No. 2162 of the board of supervisors of the city and county of San Francisco, relating to death certificates and permits for interments, held unconstitutional and void. 84 Cal. 304.

A city is liable for damages caused from the flooding of private premises by reason of a defective sewer, or by the neglect of its officers to keep the sewer in repair. 84 Cal. 12.

The first ordinance of San Francisco held valid. 76 Cal. 511.

Cities are not liable for damages caused by the neglect of their officers to perform their duties. 78 Cal. 588; 81 Cal. 618.

A whole charter is not invalid because some of its clauses are. 79 Cal. 173.

A city charter may be approved by the legislature without the concurrence of the governor. 79 Cal. 173.

Powers of supervisors of the city and county of San Francisco over water rates. 82 Cal. 286.

The County Government Act does not apply to the passage and publication of San Francisco ordinances. 85 Cal. 208.

Under section 68 of the consolidation act of the city and county of San Francisco, the publication of an amendatory ordinance, separate and complete in itself, is sufficient, without republishing the original ordinance. 85 Cal. 208.

A municipal ordinance may be void in part and valid in part. 85 Cal. 208.

A city ordinance cannot alter the burden of proof or the effect of certain acts as evidence. 85 Cal. 208.

A complaint for the violation of a license ordinance referring to the same by number, etc., held sufficient. 85 Cal. 208.

A city ordinance making the issuance of a liquor license to depend upon the permission of the board of police commissioners, or upon the approval of twelve property owners in the block, is not a violation of the federal constitution. 85 Cal. 208.

Whenever a proceeding is such as must

test the validity of municipal charter, the municipality must be made a party. 85 Cal. 238.

A complaint in *quo warranto* charging the violation of the constitution in adopting a charter held sufficient. 85 Cal. 238.

The provisions of our constitution relating to the organization of municipal corporations are mandatory and prohibitory, and must be strictly complied with, whether the legislation be by the people or by a legislature. 85 Cal. 238.

An election for the adoption of a charter is invalid if the election was held without sufficient notice, or if no duplicate of the proposed charter was delivered to the mayor or recorder, as provided by the constitution. 85 Cal. 238.

Statutes passed under a constitution are subject to and must be controlled by it, and cannot enlarge or diminish the authority it gives to a city to frame and adopt its own charter. 85 Cal. 348.

Where a petition for incorporation is not signed by a sufficient number of qualified persons, the organization thereunder is absolutely void. 85 Cal. 50.

An election held without notice or authority of law can give no title to an office or a franchise. 85 Cal. 343.

The jurisdiction and duties of inferior courts established by the legislature must be fixed by a bill regularly passed through the stages necessary to constitute it a law, under sections 15 and 16, article 4, of the constitution. 85 Cal. 333.

The jurisdiction of an alleged police court may be attacked on an appeal from a judgment rendered therein. 85 Cal. 333.

The jurisdiction of a *de facto* officer may be questioned when the office does not exist. There can be no *de facto* judge of a court that has no legal existence. 85 Cal. 333.

The provisions of the charter of Los Angeles creating a police court are unconstitutional and void. 85 Cal. 632.

It seems that the Whitney act does not apply to the city of Los Angeles. 85 Cal. 632.

A petition for a writ of mandate to compel the submission of certain questions to the electors of a city held sufficient. 85 Cal. 569.

An act applicable to only one particular named municipal corporation is special, local, and unconstitutional. 85 Cal. 369.

The provisions of the charter of Stockton as to the justice of the peace and municipal courts construed. 85 Cal. 593.

The compensation of a city justice of the peace can only be changed by an amendment to the code, and not by charter provision. 85 Cal. 593.

All charters framed under the constitution are subject to and controlled by general laws; so held as to the charter of the city of Los Angeles. 86 Cal. 37:

The street improvement act of 1889 does not provide for the taking of property without due process of law, or the giving of insufficient notice. 86 Cal. 37.

Coronado Beach is within the limits of the city of San Diego, and the act of March 16, 1889, is unconstitutional in so far as it undertakes to take away any part of the territory from the municipal jurisdiction of that city. 86 Cal. 158.

The provisions of section 44 of the charter of Los Angeles, directing the city council to appoint a depository of the public moneys, is unconstitutional. 87 Cal. 603.

A tax-payer in the city has sufficient interest in the subject-matter to enjoin the consummation of an illegal contract by the city. 87 Cal. 603.

The compensation of a marshal of a city of the sixth class, as fixed by the trustees under section 855 of the municipal corporation act, is for all duties imposed on the marshal by the act. 87 Cal. 520.

The provisions of the County Government Act requiring the board of supervisors to publish notices of their intention to purchase real property in a newspaper is mandatory, and a tax-payer may enjoin the auditor from drawing his warrant in payment for the purchase of land of which no notice has been published. 87 Cal. 631.

The provisions of the Oakland charter of 1854 giving the common council exclusive jurisdiction to determine election contests is repealed by sections 1111 et seq. of the Code of Civil Procedure. 87 Cal. 124.

The power conferred on boards of supervisors cannot be extended to require all land-owners, under a penalty, to exterminate and destroy all gophers and ground-squirrels on their respective lands, and thereafter keep said land free and clear therefrom. 87 Cal. 162.

The provisions of the constitution providing for the making and enforcing "of all such local police, sanitary, and other regulations as are not in conflict with the general laws" must be limited to those denominated police and sanitary. 87 Cal. 162.

If part of an ordinance is invalid, but can be separated from the remainder, which is valid, the invalid portion may be rejected. 87 Cal. 499.

Municipal corporation legislation is not beyond the control of injunction from courts of equity. 82 Cal. 286.

Police courts established by the charter of Oakland held to have no legal existence. 82 Cal. 339.

See CONSTITUTIONAL LAW; COUNTIES; JURISDICTION; LICENSE; STREETS; TAXATION.

NAMES.

See CRIMINAL LAW; PLEADING.

NAVIGABLE STREAMS.

See BOUNDARIES; MEXICAN GRANT; RIPARIAN RIGHTS.

NECESSARIES.

See ATTACHMENT; EXECUTION; HUSBAND AND WIFE.

NEGLIGENCE.

A notary is not liable for the indirect results of error as to identity of a person acknowledging a deed. 68 Cal. 455.

The liability of a warehouseman and of a common carrier held identical under the issue. 68 Cal. 644.

Circumstantial evidence held sufficient to sustain a judgment for damages. 68 Cal. 33.

Loss from negligence in accepting a time-check. 68 Cal. 522.

Declaration of a person five minutes after accident held not part of the *res gesta*. 69 Cal. 533.

The owner of a lot is liable for damages caused by his blasting in it. 69 Cal. 155.

A landlord is not liable for the negligence of his tenant, through which an awning falls and injures third parties. 69 Cal. 593.

A mine-owner is not responsible to an employee for injuries caused by the negligence of a fellow-employee, even if his mine is defectively constructed. 70 Cal. 392.

Action against an attorney for negligence is barred by the expiration of two years. 70 Cal. 127.

It is not neglect of an attorney to take an appeal, where such appeal would be of no avail. 70 Cal. 127.

A landlord is liable for damages to goods, caused by the negligence of his employee. 71 Cal. 159.

An employer is not liable for injuries to an employee, by the negligence of a fellow-employee, unless the negligence is partially traceable to the employer. 72 Cal. 38.

Where a servant has equal knowledge with his master of the dangers, he takes the risks upon himself; but this rule does not apply to children. 72 Cal. 38.

Employers are not liable for the negligence of their foremen or bosses in acts beyond the scope of their authority. 72 Cal. 38.

Burden of proof in actions for damages caused by negligence. 72 Cal. 245.

The mere fact that a servant knows that a machine at which he works is defective will not exonerate his employer from damages caused to such servant by its defects. 72 Cal. 197.

Action for negligence in running a railroad car over an intoxicated person. Held, that the evidence showed no negligence. 72 Cal. 120.

Instructions as to contributory negligence of a railroad passenger held proper. 72 Cal. 345.

It is held that a railroad company is not liable for the death of a conductor by the negligence of the brakeman and another conductor. 72 Cal. 523.

Case in which a plaintiff was held not guilty of contributory negligence in falling through a trap-door. 72 Cal. 254.

A person walking along the sidewalk of a public street has a right to assume that the place is safe for travel. 72 Cal. 254.

The sheriff held guilty of negligence in not requiring sureties on an indemnity bond to justify. 72 Cal. 330.

A foreman of a mine is a fellow-servant with the ordinary miners, and for damages caused to such miners by his negligence the mine-owner is not liable. 73 Cal. 26.

A person of mature age is guilty of contributory negligence who fails to look about him in crossing a railroad track. 73 Cal. 137.

The burden of showing contributory negligence is on defendant; yet where the plaintiff's evidence shows that he had not exercised the usual prudence used in like exposure and danger, the question is one of law for the court. 73 Cal. 141.

Instructions as to fire from a railroad engine held proper. 74 Cal. 323.

In an action for damages in killing a pair of horses by a train, acts of negligence not mentioned in the complaint are not admissible. 74 Cal. 9.

A notary is liable for a defective acknowledgment, only to the extent of the actual loss suffered. 75 Cal. 182.

Evidence in action against a physician for negligence. 76 Cal. 304.

An act that a prudent person would do in a like case cannot be regarded as contributory negligence. 76 Cal. 249.

Where the plaintiff's own negligence is a proximate cause of the injury, he cannot recover. 76 Cal. 474; 78 Cal. 247.

Where one's carelessness and undue confidence has enabled another to obtain money from a third person, he must answer for any loss he has caused thereby. 77 Cal. 572.

The negligence of the county clerk is not the negligence of the litigant. 77 Cal. 438.

A municipal corporation is not liable for the negligence of its officers. 78 Cal. 538; 81 Cal. 618.

Actions for negligence in maintaining railroad bridges causing the death of an engineer. 78 Cal. 247.

In an action for negligence, the plaintiff need not aver that the injury was done without fault of plaintiff. 78 Cal. 430; 82 Cal. 595.

The fact that the plaintiff (an employee) knew of the defects which caused his injury need not bar his recovery. 78 Cal. 430.

Plaintiff's knowledge of the danger to

which he was exposed is a question of fact for the jury. 78 Cal. 430; overruling 57 Cal. 15.

The question as to the fact of contributory negligence is for the jury. 78 Cal. 578.

A proximate cause of injury must be one without which the injury would not have occurred. 78 Cal. 517.

Where there is a substantial conflict as to whether negligence or inevitable accident caused the occurrence, the verdict will not be disturbed. 78 Cal. 341.

To hold the owner of an animal liable for his vicious conduct, it is essential to show that the owner had knowledge of his vicious disposition, or was negligent. 78 Cal. 498.

How far is a land-owner liable for damages caused by the negligent construction of a barbed-wire fence along a highway? 79 Cal. 317.

For injuries to one of its laborers, caused by the negligence of a track-walker or conductor, the railroad company is held not responsible. 79 Cal. 97.

Where the facts are undisputed, the question of negligence is one of law. 79 Cal. 97.

Evidence against sheriff for negligence in failing to return an order of sale. 79 Cal. 250.

Negligence of a wife in assuming in a divorce case that her husband's representations as to his property were true held inexcusable, and sufficient to bar equitable relief. 79 Cal. 17.

It is only damages that are not the necessary results of the injury that must be specially pleaded. 80 Cal. 574.

A party injured by the fall of an elevator need only show that defendant was the owner, and that plaintiff sustained injury by the breaking of the machinery; the burden of showing excuse is on the defendant. 80 Cal. 574.

Persons operating elevators are public carriers, and bound to keep pace with science, art, and all modern improvements insuring safety. 80 Cal. 574.

A saloon-keeper is not liable for damages caused to a patron by intruding on his private premises and falling into the cellar. 80 Cal. 565.

The keeper of a public place of business is bound to keep his premises and the passage-ways to it in safe condition, and to use ordinary care to avoid accidents; but this does not apply to his private premises. 80 Cal. 565.

In an action for injury caused by negligence, some obligation or duty towards the plaintiff must be shown. 80 Cal. 565.

A plaintiff whose negligence contributes to the injury cannot recover. 80 Cal. 521.

Reckless driving cannot be the basis of exemplary damages, unless it involves oppression, fraud, or malice. 80 Cal. 135.

A railroad company is liable for negli-

gence occurring on a road it has leased and controls. 81 Cal. 248.

Instructions omitting all references to the issue of contributory negligence held erroneous. 81 Cal. 98.

In an action for injuries caused by defective apparatus, the mode of use, as well as the material, held to be involved in the cause of action. 81 Cal. 190.

A contractor who leaves an open unguarded hole in the street, which causes accident and injury, is liable therefor. 81 Cal. 265.

A municipal corporation is not liable for injuries caused by the negligence of its officials. 81 Cal. 618; 78 Cal. 588.

A party who negligently allows rain-water to flow into another's cellar is liable for the damage caused thereby. 82 Cal. 595.

Where the damages have only been caused in part by the acts of defendant, a judgment against him for the whole amount is improper. 82 Cal. 595.

A constable and his sureties are responsible for injuries to goods while in his custody. 82 Cal. 604.

A principal is responsible to third persons for injuries occasioned by the negligent acts of his agent. 82 Cal. 77.

A party or his agent who introduces a person to a notary as bearing a certain name cannot complain if the notary certifies accordingly, and loss is thereby incurred. 82 Cal. 77.

The doctrine of *respondent superior* does not apply to an independent contractor. 81 Cal. 265.

The foreman of a gang of men held not a "fellow-servant." 68 Cal. 225.

An employer owes the duty to his employees of using safe and substantial machinery, and will be liable for injuries caused by neglect in failing to do so. 70 Cal. 261.

When a person knowingly assumes the hazards and risks of his employment on a construction train, there can be no recovery for injury occasioned in the course of such employment, if there is no negligence by the employer in selecting its employees, or carelessness in running of trains. 83 Cal. 18.

A verdict for a plaintiff held sustained by the evidence when it tended to show that the injury was caused by the poor construction and rotten condition of defendant's wooden dam and reservoir. 83 Cal. 198.

The negligence for which a recovery is sought must be alleged. 84 Cal. 219.

An instruction as to negligence in reference to the complaint held sufficient. 84 Cal. 515.

When there is no evidence of contributory negligence, it may be properly ignored in the instructions. 84 Cal. 515.

There can be no excuse for a death caused by blasting in a thickly settled portion of a city. 84 Cal. 515.

Under section 377, Code of Civil Procedure, an action for damages for death may be brought by either heirs or representative, but not by both. 84 Cal. 515.

The loss to a widow of the comfort, society, and protection of her husband may be taken into consideration by a jury in an action for damages for his death; but not her sorrow, grief, or mental suffering. 81 Cal. 515.

The damages recovered by the administrator for the death of a party are for the benefit of the heirs, and are not part of the estate. 84 Cal. 515.

Actions for damages for the death of a person in the passage-way of a warehouse. 84 Cal. 489.

Verdict for three thousand dollars damages for the death of a person, the sole support of his mother, held not excessive. 84 Cal. 489.

A city is liable for damages to private residences caused by a flooding through defective sewers, and for the neglect of its officers in not keeping such sewers in repair. 84 Cal. 12. See 81 Cal. 618.

Failure of a railroad company to comply with the law as to the blowing of whistles and ringing of bells, as to a railroad crossing, makes it *prima facie* liable for such accident as may occur, unless the person injured contributes thereto by his own negligence; and this regardless of other efforts of the engineer to avoid such injuries. 85 Cal. 291.

Unless the evidence is undisputed, the question of contributory negligence is for the jury. 85 Cal. 291; 78 Cal. 430.

The mere fact that animals, when killed by a train, were running at large will not of itself show contributory negligence on the part of the owners. 55 Cal. 291.

When a railroad company carries a passenger beyond its usual stopping-places, to a place where there is a special risk and hazard, it is its duty to use every precaution for his protection. 85 Cal. 63.

Negligence is not absolute, but it is relative to surrounding circumstances of time, place, and person. 85 Cal. 63.

A nonsuit for contributory negligence should only be granted when there could be no valid verdict in plaintiff's favor. 85 Cal. 63.

Carriers owe more than ordinary duty to their passengers. A passenger has a right to presume that the employees of the carrier will use ordinary prudence. 85 Cal. 63.

A person who walks on a railroad track without permission or right is a trespasser. 86 Cal. 374.

A railroad company is not bound to give a trespasser warning signals, when not aware of his presence. 86 Cal. 374.

The law requiring a bell to be rung or whistle to be blown on approaching a cross-

ing is not for the benefit of trespassers on the railroad track. 86 Cal. 374.

In the absence of evidence showing that a rope was being properly used, it will not be presumed that the defendant was negligent in not providing one sufficiently strong to prevent the accident. 80 Cal. 445.

The rule that an accident is evidence of the insufficiency of the machinery applies only where it is shown to have been used in the usual and proper way. 86 Cal. 445.

Where injury from a railroad accident is admitted, and it appears that at the time of the accident the train was running down a steep incline, at an unusual and dangerous speed, the burden of proving that the injury was not caused by its want of care is on the railroad company. 87 Cal. 62.

Section 484 of the Civil Code, protecting a railroad company from damage for an injury to a passenger, received on the platform of a car, in violation of its posted regulations, has no application where the passenger was injured on the platform in attempting to escape from the imminent danger. 87 Cal. 62.

Whether an attempt to escape from a car was an unreasonable or a rash act, or was one which a person of ordinary care or prudence might do, are questions for the jury. 87 Cal. 62.

The right of action for personal injuries to the wife is community property, and the contributory negligence of the husband will prevent a recovery by her for injury sustained by the alleged negligence of a third party. 87 Cal. 464.

The husband is a necessary party to an action for damages on account of injuries to the wife's person. 87 Cal. 464.

Inviting and permitting a child of tender years to ride alone on a dangerous sweep drawn by a horse, in consequence of which the child is injured, is negligence on the part of the person in charge of the sweep, even though he may have cautioned the child to be careful. 87 Cal. 545.

An instruction that a child of tender years cannot be charged with negligence in exposing itself to a danger which it did not comprehend held proper. 87 Cal. 545.

It is not requisite to present a claim for damages against the municipality, for injuries caused by a defective sewer, to the board of supervisors of the city and county of San Francisco, before instituting a suit to recover the same. 84 Cal. 12.

Negligence in suits against railroads for injuries discussed. 68 Cal. 644; 68 Cal. 171; 68 Cal. 33; 69 Cal. 533; 72 Cal. 38; 72 Cal. 120; 72 Cal. 345; 72 Cal. 523; 73 Cal. 93; 73 Cal. 137; 74 Cal. 323; 74 Cal. 9; 76 Cal. 474; 78 Cal. 430; 79 Cal. 97; 81 Cal. 248; 81 Cal. 98; 83 Cal. 18; 85 Cal. 291; 85 Cal. 63; 86 Cal. 374; 87 Cal. 62.

The breaking of a stage-coach wheel, as

prima facie evidence of negligence. 70 Cal. 417.

Negligence is leaving obstructions overnight in a passage-way to a dwelling-house. 79 Cal. 74.

See DAMAGES; EMPLOYER AND EMPLOYEE.

NEGOTIABLE INSTRUMENTS.

Purchaser of promissory note after its apparent maturity is not an indorsee in due course of business, so as to defeat a defense thereto. 68 Cal. 545; 69 Cal. 142.

A provision therein for the payment of attorney's fees renders a note not negotiable. 68 Cal. 545; 82 Cal. 636.

The mere possession after maturity of a note indorsed in blank by the payee is not proof of authority to transfer it. 68 Cal. 545.

Under the act of 1878 a warehouseman's receipt is negotiable, unless marked otherwise. 68 Cal. 607.

Action on a promissory note can only be brought by the actual owner. The defendant in such action may show that the plaintiff paid no consideration for it, and is not the legal owner of it. 69 Cal. 142.

A complaint on a promissory note which alleges that the note was indorsed by and assigned and delivered to plaintiff is sufficient without alleging that plaintiff was the owner. 69 Cal. 569.

Failure of consideration is a good defense to a promissory note assigned with notice or after maturity. 71 Cal. 481.

That the actual consideration was not what it appears is no defense to a promissory note. 72 Cal. 224.

A payment made on a promissory note, over and beyond the interest due, will be applied on the principal, and not to future interest. 72 Cal. 568.

A certificate of deposit belongs to the party in whose name it was deposited. 73 Cal. 464.

A promissory note is not invalid because the money was knowingly advanced for gambling, in which the payee did not win, nor the maker lose. 73 Cal. 411.

An option to consider a note due for default of payment of interest must be exercised in a reasonable time. 73 Cal. 213.

An indorser on a note bearing interest payable at sight or on demand is not exonerated by the failure to present the note for payment after its apparent maturity. 74 Cal. 362.

Where an accommodation indorser is sued, he may, without trial of the action, pay the same and enforce contribution from his co-indorser. 74 Cal. 362.

A promissory note which places the amount in figures only is valid. 75 Cal. 268.

A pledgee of a promissory note without
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consideration can only hold the pledgor liable for the amount for which it was pledged. 75 Cal. 86.

A promissory note given to settle illegal damages, and to avoid the costs of a threatened suit, is without consideration. 75 Cal. 86.

A maker of a promissory note who adds to his name the word "president" is personally liable. 76 Cal. 203.

Liability of accommodation indorser to subsequent indorsees by agreement. 76 Cal. 127.

Fraud or mistake is not a defense to a promissory note in the hands of an innocent indorsee for value before maturity, without notice. 77 Cal. 572.

In an action by the indorser against the maker of the note, which note has been paid by the indorser, it is proper to show the circumstances under which it was made. 77 Cal. 79.

An immaterial alteration in a note will not invalidate it. 79 Cal. 69.

The payee of a demand note may sue the maker without any demand other than that made by the suit itself; sections 3155 and 3130 construed. 79 Cal. 224; 82 Cal. 32.

Possession of a promissory note by the payor is presumptive of payment; possession by the payee is presumption of non-payment. 79 Cal. 565.

The statute of limitations begins to run against a note payable on demand immediately. 82 Cal. 34.

Where a plaintiff inadvertently closed his case without proof of an indorsement, it is error, pending a motion for a nonsuit, to refuse to allow him to supply the defect in the evidence. 70 Cal. 19.

One who adds his name to a promissory note as a maker, after its delivery, and without consideration, is not liable thereon. 80 Cal. 139.

An instrument acknowledging a sum to be due when a suit is decided is not a promissory note. 83 Cal. 215.

When it is admitted or proven that the consideration for a promissory note is illegal, a *prima facie* case of notice of such illegality to the indorsee is made out. 83 Cal. 173.

The assignee of a promissory note for value, without notice of illegality, may recover. 83 Cal. 173.

When the assignee of a promissory note testifies that he purchased it for a valuable consideration, it is proper to cross-examine him as to notice of its illegality. 83 Cal. 173.

A note payable on demand is due without demand. 81 Cal. 631; 82 Cal. 32.

A note payable "on demand after date" is an ordinary demand note, payable immediately. 81 Cal. 631.

Ordinarily, an indorser cannot dispute his liability; yet it may be shown by parol, from the way the indorsement was procured, that

it would be a fraud upon him to permit its enforcement. 85 Cal. 90.

One who takes a note after maturity takes it subject to any defense which could have been interposed against a prior indorsee. 85 Cal. 90.

Where the name of a maker has been signed without his authority, he cannot be liable therefor, even if he fails to repudiate the signature. Such failure does not amount to a ratification of the signature. 85 Cal. 102.

Where a co-maker who is merely a surety pays off the note, it thereby becomes extinguished. 86 Cal. 184.

The fact that the purchaser of a note was one of its makers puts the purchaser on inquiry as to the fact of its payment. 86 Cal. 184.

Section 1774 of the Civil Code applies only to the transfer of paper in due course to an innocent holder. 86 Cal. 184.

A debt may be extinguished by a note, if accepted as payment. 86 Cal. 449.

Notice of protest to charge an indorser held sufficient. 86 Cal. 449.

Where a note is given in extinguishment of a previous note, and is silent as to interest, the holder can only recover legal interest. 86 Cal. 449.

A note payable to certain persons, omitting "or order," "or bearer," is not negotiable. 81 Cal. 305.

An assignment of the note after maturity is subject to all equities and defenses of the maker against the payee. 81 Cal. 303.

A negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment. 82 Cal. 636.

If a note is paid either by principal or surety, it is extinguished as to the surety. 82 Cal. 128.

One who subscribes his name on the face of a joint note, with the word "surety" added, is liable as a maker, and not as an indorser. 87 Cal. 616.

See AGENCY; APPEAL; BONDS; CONVERSION; CORPORATION; FRAUD; LANDLORD AND TENANT; MORTGAGES; NONSUIT; PARTNERSHIP; PLEADING.

NEW MATTER.

See PLEADING.

NEWSPAPERS.

See IRRIGATION DISTRICTS; LIBEL.

NEW TRIALS.

The right is purely statutory. 68 Cal. 485.

General prerequisites. 68 Cal. 485; 69 Cal. 251; 70 Cal. 482; 71 Cal. 491; 71 Cal. 513; 74 Cal. 269; 80 Cal. 330. Sufficiency of specifications of error in statement. 72 Cal. 178; 74 Cal. 530; 75 Cal. 115; 76 Cal. 594; 76 Cal. 647; 76 Cal. 106; 78 Cal. 31.

Settlement of statement. 73 Cal. 475; 70 Cal. 548; 73 Cal. 475; 76 Cal. 594.

Discretion of court in granting. 68 Cal. 403; 68 Cal. 231; 70 Cal. 482; 70 Cal. 548; 71 Cal. 582; 72 Cal. 475; 72 Cal. 178; 73 Cal. 241; 77 Cal. 90; 78 Cal. 430; 79 Cal. 404; 80 Cal. 519; 80 Cal. 448; 82 Cal. 14.

Denial of motion for. 71 Cal. 491.

Motion held properly granted. 68 Cal. 162; 70 Cal. 562; 71 Cal. 582; 71 Cal. 221; 77 Cal. 90; 77 Cal. 284; 78 Cal. 31; 80 Cal. 330; 79 Cal. 404.

The failure of the judge to file his decision within thirty days after the case is submitted is not ground for a new trial. 87 Cal. 569.

An order granting a new trial will be reversed as readily as an order refusing it, when it is granted solely through a misapprehension of law. 87 Cal. 425.

Excusable neglect is not one of the grounds for a new trial under section 473 of the Code of Civil Procedure. 83 Cal. 225.

"Accident and surprise" mean, in law, the same thing, and denote some condition or situation in which a party or cause is unexpectedly placed to his injury, without any default or negligence of his, and which ordinary prudence could not guard against. 83 Cal. 225.

Relief on the grounds of surprise will not be granted unless it be shown that the party has been injured, and that a different result would be reached if a new trial was allowed. 83 Cal. 225; 83 Cal. 198.

An order granting a new trial will not be disturbed if it can be sustained on any of the grounds of the motion. 83 Cal. 130.

"Insufficiency of evidence to support the judgment," or that "the judgment is against law," are not causes for granting a new trial under our statutes, and to grant the motion on such grounds is improper. 83 Cal. 450.

When the judge has granted an extension of time for thirty days to prepare and serve a statement, his power is exhausted. 83 Cal. 319.

A statement not used on a motion for a new trial cannot be used on an appeal from the judgment. 83 Cal. 159.

When the party relies on the insufficiency of the evidence, or errors not appearing on the judgment roll, he must secure a bill of exceptions, or take the steps necessary for a motion for a new trial. 83 Cal. 159.

Only those findings specified in the statement can be reviewed upon the question of the insufficiency of the evidence. 83 Cal. 636; 84 Cal. 299.

Apparent inconsistencies in the transcript

must be reconciled, if possible. 83 Cal. 507.

Intoxication of juror as ground for a new trial. 84 Cal. 639.

Where a juror's intoxication was known and not objected to during the trial, it is too late to raise the objection after the case has been decided. 84 Cal. 639.

The refusal of a continuance because of the illness or indisposition of counsel held not sufficient cause for granting a new trial. 84 Cal. 272.

A specification that there is no evidence to support a particular finding is insufficient. 84 Cal. 299.

When a judgment is reversed for a finding against evidence, and the cause is remanded for a new trial, the trial court need not try the entire cause anew, but may confine the evidence to the issue erroneously decided. 73 Cal. 317.

Right to a new trial as limited by proceedings had in due time. 77 Cal. 525; 70 Cal. 390; 80 Cal. 330; 81 Cal. 621; 82 Cal. 51; 83 Cal. 319; 83 Cal. 159; 86 Cal. 594.

An objection to the absence of the judge from the court-room during a portion of the trial can only be urged on the ground of irregularity. 84 Cal. 489.

Notice of intention to move for. 68 Cal. 73; 68 Cal. 156; 71 Cal. 557; 73 Cal. 307; 80 Cal. 330; 75 Cal. 590.

Notice of motion, service of. 68 Cal. 184.

Waiver of irregularities in notice. 68 Cal. 73; 68 Cal. 156; 69 Cal. 251; 77 Cal. 525. Non-waiver. 72 Cal. 217.

Record of contents of. 68 Cal. 22; 74 Cal. 299; 75 Cal. 590.

Time for filing notice and statement. 68 Cal. 22; 73 Cal. 204; 73 Cal. 475; 76 Cal. 594; 77 Cal. 525; 80 Cal. 411.

New trial on ground of excusable neglect of attorney. 80 Cal. 330.

For excusable neglect of a party. 83 Cal. 225.

Motion for new trial. 71 Cal. 395; 71 Cal. 513; 72 Cal. 283.

Statement in motion for. 70 Cal. 390; 70 Cal. 458; 73 Cal. 204; 80 Cal. 426; 80 Cal. 448; 81 Cal. 621; 82 Cal. 51; 72 Cal. 283.

Applicant held not entitled to new trial. 68 Cal. 576; 69 Cal. 247; 69 Cal. 180; 70 Cal. 8; 71 Cal. 307; 72 Cal. 218; 72 Cal. 187; 73 Cal. 307; 73 Cal. 243; 73 Cal. 604; 74 Cal. 547; 74 Cal. 389; 75 Cal. 205; 75 Cal. 631; 75 Cal. 277; 75 Cal. 506; 75 Cal. 349; 75 Cal. 115; 76 Cal. 573; 76 Cal. 106; 76 Cal. 594; 76 Cal. 567; 76 Cal. 647; 77 Cal. 525; 78 Cal. 41; 78 Cal. 345; 79 Cal. 404; 79 Cal. 232; 80 Cal. 448; 81 Cal. 261; 81 Cal. 190; 85 Cal. 445; 86 Cal. 497.

When an order granting a new trial is silent as to the ground on which it was made, and a valid ground is shown on the record, it will be presumed to have been made on such ground. 85 Cal. 376.

A judge should grant a new trial whenever he is not satisfied with the verdict given upon the evidence. 85 Cal. 376.

Specifications as to the insufficiency of the evidence must point out such insufficiency. A specification that merely states that there was no evidence to sustain or justify certain findings by number is insufficient. 84 Cal. 299.

A party who claims to be surprised must move for a continuance at once; he cannot wait until after the case has been decided against him. 85 Cal. 557.

Statements on motion for a new trial are governed by the same rules of law as that which applies to bills of exceptions. 86 Cal. 594.

Question as to whether a court can relieve the party moving for a new trial, from the result of a failure to file in time, on the ground of mistake, surprise, or excusable neglect, not decided; but in any case, the point cannot be determined by *mandamus*. 86 Cal. 594.

Newly discovered evidence merely cumulative, and not such as will render a different result probable, is not ground for a new trial. 86 Cal. 497. See also 86 Cal. 445; 82 Cal. 14.

Erroneous orders in relation to. 68 Cal. 5; 70 Cal. 390.

Notice of motion no part of the judgment roll. 72 Cal. 217.

Modification of judgment on new trial or appeal. 73 Cal. 317; 81 Cal. 81; 81 Cal. 370.

Effect of granting motion for. 76 Cal. 90. See APPEAL; BILL OF EXCEPTIONS; CRIMINAL LAW; FINDINGS; JUDGMENT.

NON-RESIDENT.

See PROBATE LAW.

NONSUIT.

Where a nonsuit is granted, the decision will be upheld if the ruling can be justified on any ground, whether specified in the motion or not. 87 Cal. 410.

See APPEAL; DAMAGES; EJECTMENT; MINING CLAIMS; NEGOTIABLE INSTRUMENT; NEW TRIAL; PARTITION; PARTNERSHIP; PRACTICE.

NOTARY PUBLIC.

See ACKNOWLEDGMENT; JURISDICTION; MARRIED WOMEN; NEGLIGENCE; PARTIES; SUMMONS.

NOTICE.

Notice for service need not be deposited in post-offices at any particular place. 61 Cal. 469, and 73 Cal. 25, in this respect are overruled. 83 Cal. 574.

Actual possession by a lessee is sufficient to put a purchaser from the lessor on inquiry as to his rights, regardless as to whether he knows of such possession or not, it being his duty to know. 85 Cal. 270.

A vendee is presumed to have purchased with full notice of all the rights of the party in actual possession. This can only be rebutted by proof of diligent and unavailing effort to obtain actual notice of any right of the party in possession. 85 Cal. 270.

Notice of equities, or of a defect in title to an attorney or agent, is constructive notice to the client or principal. 86 Cal. 500.

The doctrine of constructive notice by recording has only reference to purchasers and encumbrancers. 80 Cal. 90.

Superior courts have power to extend the time to serve and file notices, except those on appeal for thirty days. 68 Cal. 485.

A law requiring publication in a newspaper is fulfilled by publication in its supplement. 72 Cal. 405.

A slight error in a notice will not invalidate it. 79 Cal. 351.

Means of knowledge held equivalent to notice. 75 Cal. 128.

A purchaser of land takes with notice of a recorded deed, as by a *lis pendens*. 78 Cal. 144.

See AGENCY; APPEAL; ATTACHMENT; BONA FIDE PURCHASER; BONDS; BILL OF EXCEPTIONS; CONTEMPT; CONTRACT; CORPORATION; COSTS; CRIMINAL LAW; DEED; DEPOSITION; EXECUTION; FRAUD; FORCIBLE ENTRY; GUARDIAN AND WARD; HOME-STEAD; INSURANCE; JUDGMENTS; JUDICIAL NOTICE; JURISDICTION; JUSTICES' COURTS; LANDLORD AND TENANT; LIS PENDENS; MORTGAGES; MECHANIC'S LIEN; NEW TRIALS; PLEDGE; VENDOR AND VENDEE.

NUISANCE.

Justices of the peace have no jurisdiction over the crime of public nuisance. 68 Cal. 412.

Overhanging trees as nuisances, remedy. 70 Cal. 161.

A suit for abatement may be joined with one for damages for the nuisance. 70 Cal. 161.

Several distinct injuries must specify the amount of damage for each, else the complaint is demurrable. 70 Cal. 161.

Special damages must be shown, to sustain a private complaint for a public nuisance. 71 Cal. 83; 74 Cal. 463.

An action to abate a nuisance is a suit in

equity, and an injunction may be granted, even if not prayed for. 72 Cal. 248.

A business in a large city, that annoys residents because of its soot, may be restrained, despite a license from the board of supervisors. 72 Cal. 248.

One who purchases property that is a nuisance assumes the subsequent damages. 72 Cal. 180.

A hole in a sidewalk held to be a nuisance. 72 Cal. 254.

Obstructions to a private way will be abated by injunction. 76 Cal. 472.

A railroad in Golden Gate Park so constructed as not to obstruct the free use thereof by the public held not a nuisance. 76 Cal. 156.

A row of trees on a boundary line held not a nuisance. 78 Cal. 611.

Overhanging branches, if a nuisance, may be cut off. 76 Cal. 611.

Causing water to overflow on another's land held to be a nuisance, even though the damage be but nominal. 78 Cal. 454.

It does not relieve from a liability caused by negligence in failing to keep sewers in repair, that the precipitation of water was extraordinary and unusual, if the sewer as originally constructed was sufficient to carry off all the water. 84 Cal. 12.

A brass-foundry and its machinery are not *prima facie* nuisances, but may become so by reason of their peculiar location or the improper manner in which they are conducted; an injunction in such a case should be against the improper mode of operation, leaving the defendant at liberty to operate his works so as to cause no injury. 87 Cal. 134.

A finding of damages in the sum of one dollar held erroneous. 78 Cal. 454.

A wrong-doer cannot escape liability because his share in the injury cannot be accurately measured. 78 Cal. 454.

Acquiescence in a nuisance is no defense in a suit against its continuance. 78 Cal. 454.

See DAMAGES; EASEMENT; HIGHWAYS; INJUNCTION; LANDLORD AND TENANT; NEGLIGENCE; WATER RIGHTS.

OAKLAND.

See MUNICIPAL CORPORATIONS.

OFFER.

See CONTRACT.

OFFICER.

See CORPORATIONS; COUNTY; MUNICIPAL CORPORATIONS; PUBLIC OFFICERS.

ONCE IN JEOPARDY.

See CRIMINAL LAW.

OPIUM.

See CRIMINAL LAW.

ORANGE COUNTY.

See CONSTITUTIONAL LAW; JURISDICTION.

ORDER.

See APPEALS; DIVORCE; JURISDICTION; INSOLVENCY; JUDGMENT; NEW TRIAL.

ORDINANCE.

See CONSTITUTIONAL LAW; COUNTIES; MUNICIPAL CORPORATIONS.

ORNAMENTS.

See PROBATE LAW.

OUSTER.

See EJECTMENT; FORCIBLE ENTRY; JOINT TENANCY.

OWNERSHIP.

See CRIMINAL LAW; PLEADING; PROMISSORY NOTE.

PARENT AND CHILD.

An uncle who receives his minor niece into his family stands toward her as a parent. He is bound to support and clothe her without charge, and she has no claim for her services. 71 Cal. 495.

A husband who receives into his family a child of his step-daughter is not entitled to compensation for its support. 74 Cal. 320.

In California an adopted child is entitled to inherit the estate of its adopted parent. 75 Cal. 213.

Children born during coverture are presumed legitimate. 75 Cal. 379.

A parent may recover damages for the death of his minor child. 76 Cal. 240.

A child who has remained for one year in an orphan asylum, wholly supported thereby, cannot be adopted without the consent of the managers. 80 Cal. 216.

The statutes before the code in reference to the adoption of illegitimate children are to be strictly construed as being in derogation of common law. 81 Cal. 408. (Three justices dissenting.)

The public acknowledgment of an illegitimate child requires him to be so held out to relatives, friends, and the world, and treated in like manner as if legitimate. 81 Cal. 408. (Three justices dissenting.)

An order of adoption is void, where the person whom the parents agreed with for adoption, and the person in whose custody the child is found, are apparently separate and distinct persons. 87 Cal. 640.

In cases of adoption, the power of the superior court is special and limited, and its jurisdiction must appear by the record as to both subject-matter and person. 87 Cal. 640.

The record of adoption must show that the person adopting the child is a resident of the county in which the order is made. 87 Cal. 640.

The provisions of the statute of adoption must be strictly followed, else the child cannot inherit from the adopting parents. 87 Cal. 640.

Acquiescence in a claim of adoption for many years cannot estop the parents from claiming the custody of their child. 87 Cal. 640.

A parent is not entitled to the custody of a child who is old enough to work and care for himself, after consenting to his emancipation; but this rule does not apply to one of tender years. 87 Cal. 640.

The legislature has full power to regulate the adoption of children. 83 Cal. 322.

See ADOPTION; GUARDIAN AND WARD.

PARK.

See DEDICATION; MECHANIC'S LIEN; NUISANCE.

PARTIES.

The husband is a necessary party to an action for damages on account of injuries to the wife's person. 87 Cal. 464.

In a suit to quiet title, the defendant may, by his cross-complaint, bring in whatever parties are necessary to the determination of a controversy. 87 Cal. 258.

In an action to foreclose a street assessment in the city and county of San Francisco, under the act of 1871-72, it is essential

that all the owners of the property be made parties defendant. 87 Cal. 11.

"Proper parties" in equity. 68 Cal. 419.

Legal representative of decedent as a joint defendant. 68 Cal. 310.

Suit against joint defendants, such as partners, requires service of summons on each. 69 Cal. 456.

Objections to non-joinder or misjoinder must be taken by demurrer or answer, otherwise the objection is waived. 71 Cal. 557.

Errors as to misjoinder held cured by a nonsuit as to one defendant. 71 Cal. 557.

The holder of the legal title is the real party in interest, though a trustee. 73 Cal. 415.

A party but indirectly interested in a contract cannot sue thereon. 73 Cal. 522.

In an action to reform an acknowledgment of a married woman, the notary is not a necessary party. 73 Cal. 452.

In a suit to compel a corporation to transfer stock purchased at sheriff's sale, the debtor is not a proper party. 76 Cal. 537.

Necessary parties in a suit to reform a trust agreement. 85 Cal. 488.

In an action in the nature of *quo warranto*, where the proceeding must test the validity of a municipal charter, the municipality must be made a party. 85 Cal. 238.

The widow of a deceased partner is a proper party defendant in a suit by a copartner against the representative of a deceased copartner for an accounting and settlement of a partnership. 85 Cal. 436.

A trustee of an express trust in the nature of a mortgage may sue to foreclose without joining the beneficiary. 87 Cal. 245.

The treasurer of a benevolent society may sue for himself and his co-members to compel its ex-treasurer to pay over its funds. 77 Cal. 247.

The mayor need not be joined in an action against the city and county of San Francisco. 82 Cal. 286.

Several persons having separate tracts, through which a stream flows, may join as plaintiffs in a suit to restrain a diversion of the water. 84 Cal. 233.

See APPEALS; ASSIGNMENT; BENEFICIAL ASSOCIATIONS; BONDS; CHURCH; CONTRACT; CORPORATIONS; EJECTMENT; ELECTION; FRAUD; INSURANCE; JOINT TENANT; MECHANIC'S LIEN; MORTGAGE; PARTITION; PARTNERSHIP; PLEADING; PUBLIC OFFICER; QUIETING TITLE; SURETIES; TRUST.

PARTITION.

In a suit in partition, a purchaser from defendants *pendente lite* is liable for their proportion of costs. 68 Cal. 383.

A judgment in partition is conclusive upon all the parties thereto as to whatever claim they had at the time. 68 Cal. 73.

In an action for damages to real property, oral evidence may be given to show fraud or mistake in a contract for partition. 68 Cal. 19.

An erroneous distribution of ten dollars to a person not entitled to it is not sufficient cause for reversing the judgment. In such case, the maxim, *De minimis non curat lex*, is applicable. 73 Cal. 219.

An action for partition involving the appointment of a receiver may lie, where the property is growing crops. 75 Cal. 319.

A stipulation, pending a suit for partition, consisting of an indivisible agreement, must be executed by the court as a whole. 76 Cal. 489.

An interlocutory decree and partition cannot be abrogated or diminished by the final decree. 76 Cal. 383. The rule is different in other interlocutory decrees. *Id.*

A plaintiff who depends on partnership for an accounting is not entitled to relief on mere proof of tenancy in common. 76 Cal. 44.

Action by assignee for partition of homestead in insolvency. 78 Cal. 263.

Dismissal of an action for partition under an agreement of compromise may operate as an estoppel. 79 Cal. 603.

The probate court has no jurisdiction to make partition except in the course of settling up estates, nor further than the decedent's interest. 80 Cal. 490.

It is a very proper thing for the probate court to distribute the interest of the decedent among his heirs, undivided, without partition. 80 Cal. 492.

Under section 797 of the Code of Civil Procedure a single referee may be appointed to make partition by consent. 80 Cal. 490.

A decree in partition gives to each tenant in common the exclusive possession allotted to him. 80 Cal. 490.

A so-called cross-complaint in partition which is only a repetition of the answer alleging exclusive ownership need not be answered. 80 Cal. 271.

An appeal in partition stays all proceedings in the court below, on the usual three-hundred-dollar appeal bond. 80 Cal. 452.

A contract with a purchaser at partition sale held void as against public policy. 80 Cal. 570.

Service of summons on minors in partition, how made and proven. 80 Cal. 491.

In probate partition, only the estate and the heirs and devisees can be heard. The grantee of such heirs cannot be affected by a decree to which he is not a party. 82 Cal. 68.

Order before final judgment held non-appealable. 83 Cal. 445.

An interlocutory decree fixes the rights of the parties at its date. 84 Cal. 541.

A patent clerical error in a decree may be amended at any time. 84 Cal. 511.

The correction of a clerical error does not extend the time for appeal from the decree. 84 Cal. 511.

The burden of proof is on a party who asks for the sale instead of a partition of property, to show it necessary. 84 Cal. 409.

An action for partition may be maintained by the owner of an equitable title. Such title is real property, and an estate of inheritance. 86 Cal. 500.

Equity will not permit litigation by piecemeal, but will determine the whole controversy, so as to prevent future litigation. 86 Cal. 500.

The allowance of commissioner's fee in a probate proceeding for partition. 86 Cal. 274.

See APPEALS; DIVORCE; PROBATE LAW; STATUTE OF LIMITATION; TENANTS IN COMMON.

PARTNERSHIP.

Partnership property cannot be exempt from execution though it is such property as would be exempt if one partner were the sole owner. 77 Cal. 403.

An oral agreement to wind up partnership affairs is not within the statute of frauds, even if it was not expected to be accomplished in a year. 68 Cal. 466.

A general assignment for the benefit of creditors by a firm operates as a dissolution of the partnership. 68 Cal. 243.

In an action against two persons alleged to be partners, but sued as individuals, summons must be served on each. 69 Cal. 456.

An allegation of copartnership held sufficient, in the absence of special demurrer. 69 Cal. 133.

Identity of partnership will not be presumed from a mere similarity of firm name. 69 Cal. 616.

Contracts made with several persons are presumed to be joint, not several. 69 Cal. 616.

In a suit against a partnership, all the partners must be made defendants, unless sued by their firm name. 69 Cal. 616.

A surviving partner cannot maintain an action against the executor of his deceased partner for an accounting. 70 Cal. 581.

In a suit by partners doing business under a fictitious name, an allegation that they have not published a notice of copartnership is immaterial, when it does not appear by any pleading that the action is upon an account contracted in the partnership name. 70 Cal. 396.

The assignee of a partnership claim is not affected by the law requiring the publication of a notice of copartnership. 70 Cal. 194.

A newspaper notice is evidence to show who conducted the partnership business after dissolution. 70 Cal. 560.

Under the insolvency law, a petition describing the creditors as copartnerships is sufficient. 70 Cal. 132.

A stallion is not "merchandise" within the meaning of section 2430 of the Civil Code. 71 Cal. 498.

A partner cannot, by selling his interest in the partnership property, deprive his copartners of the right of possession. 71 Cal. 499.

In an action for accounting, where the partnership is denied, the findings were held sufficient in substance. 71 Cal. 578.

In an action on a contract executed to a copartnership, the debtors cannot deny such copartnership. 72 Cal. 544.

No particular form of the allegation of partnership is necessary in a complaint. 72 Cal. 544.

A certain transaction held not to create a partnership. 72 Cal. 477.

Judgment against alleged partners, where only one was served with summons, held not void as to the person so served. 72 Cal. 264.

An unsettled partnership account cannot be set up as a counterclaim against an individual demand. 72 Cal. 224.

A suit for accounting against a surviving partner, not brought for twenty-five years, held "stale," and not to be entertained by a court of equity. 73 Cal. 285.

The priority of a firm creditor over the creditor of an individual partner must be maintained, and is a right in equity. 73 Cal. 389.

An action not brought under section 388 of the Code of Civil Procedure cannot bind the joint interests without service of summons on each person. 73 Cal. 393.

A finding that realty standing in the individual names of the partners was really partnership assets held supported by the evidence. 73 Cal. 394.

An objection to a partnership complaint, that the copartnership have failed to file their partnership certificate, must be taken by demurrer or answer. It is, in effect, an objection to the legal capacity of the plaintiffs to sue. 74 Cal. 151.

In an action for accounting, the settlement should be complete even down to the day of the trial. 73 Cal. 396.

A certificate of copartnership may be signed by a general attorney in fact. 74 Cal. 586.

A partner has a right to treat the partnership as dissolved by the wrongful and fraudulent acts of his copartner. 74 Cal. 280.

The defense by a partner, that he has been released from liability, held properly proven without special plea. 74 Cal. 418.

Where a dissolution does not commit to any one partner the liquidation of the firm affairs, either of the partners has authority to compromise or release from debts. 74 Cal. 418.

Ownership of real estate will not be regarded as a partnership trust because improvements have been made thereon with partnership funds. 74 Cal. 590.

A person with whom a decedent had a partnership account unsettled is not competent to be his administrator. 74 Cal. 338.

An agreement between part owners of a ship to use it in a joint enterprise is a partnership in the use of the ship, and not in the ship itself. 75 Cal. 566.

It is not necessary that a surviving partner should have completed the liquidations of the partnership affairs before an action for an accounting can be maintained against him. 75 Cal. 519.

The statute of limitations does not run between partners until the accounts are settled and a balance struck. 75 Cal. 566.

A probate court may require a person who claims to be the surviving partner to file his account, but cannot settle the same, nor if the partnership be denied, decide as to its existence. 75 Cal. 462.

A judgment against three persons constituting a partnership, but one of whom died before trial, held erroneous. 75 Cal. 590.

Averment of copartnership in a complaint against it held sufficient. 75 Cal. 590.

A purchase of the interest of a deceased partner in the partnership property does not create a partnership. 76 Cal. 44.

A debt assumed by the firm may be secured by the note of the firm, properly executed by either partner. 76 Cal. 255.

A plaintiff who depends on partnership for an accounting is not entitled to such relief on mere proof of tenancy in common. 76 Cal. 44.

A new partner is not liable for the debts of the old firm, unless he agrees to become so. 77 Cal. 440.

Where a partner borrows money from another to put into the firm, the loan is not a partnership transaction. 77 Cal. 54.

Partnership property is not in insolvency exempt from execution, like that of individuals. 77 Cal. 403.

An instruction relating to the partnership indorsement of a note held correct. 77 Cal. 84.

After dissolution, a partner cannot revive a debt barred by limitation. 78 Cal. 225.

Where a partner, after dissolution, pays all the firm debts, he may sue his late copartner's estate for contribution. 78 Cal. 540.

In a joint suit by several copartners, judgment cannot be entered in favor of one of them, whatever the evidence may be. 78 Cal. 254.

A copartnership formed for the manufacture of hay-presses held to include the patent afterwards obtained. 78 Cal. 149.

The rescission of a partnership contract for fraud must be promptly made after dis-

covery, and show some damage. 78 Cal. 389.

A parol agreement of partnership to deal in real estate is not void under the statute of frauds. 79 Cal. 23; even if it were so, a copartner, after receiving the profits, is estopped from denying its validity. 79 Cal. 25.

A "written grub-stake" contract, by which a miner is to give a share of his discoveries in return for food to be supplied him, construed. 79 Cal. 62.

The right of eminent domain for railroad purposes may be exercised by a partnership as well as by a corporation. 79 Cal. 159.

In an action to quiet title against an estate, both heirs and executors are proper parties. 70 Cal. 509; 80 Cal. 257.

An agreement by which one is to manage and the other to work, the profits to be divided, constitutes a strict partnership. 81 Cal. 14.

Where one of two copartners has abandoned the business, the other can sell the entire property of the firm. 81 Cal. 14.

A new firm may assume the indebtedness of an old firm. 81 Cal. 625.

It is doubtful if partnership fixtures are a part of the stock of goods. 81 Cal. 81.

A partner cannot be charged with the loss of a debt through the statute of limitations, if his copartner also knew the facts in relation thereto. 81 Cal. 81.

The fact that a stranger is improperly sued as one of several copartners will not justify a nonsuit. 81 Cal. 81.

In a sale of a partner's interest to third persons by bill of sale, the purchaser is bound by the instrument, regardless of the conversations which precede it. 82 Cal. 474.

An oral agreement partially performed is not superseded by a subsequent memorandum in writing, not inconsistent therewith. 87 Cal. 434.

Where an oral agreement is made for a partnership for the purchase and sale of land to be held in the name of one partner, and the refusal of such partner to account, an action will lie in favor of his copartner for a dissolution of the partnership and an accounting. 87 Cal. 434.

Two persons doing business under the name of Pendleton and Williams, the same being their real names, need not file with the clerk a certificate stating their names any fuller; their names in full are not required. 85 Cal. 142.

The widow of a deceased partner is a proper party defendant, in a suit by a copartner against the representative of a deceased copartner for an accounting and settlement of a partnership. 85 Cal. 436.

A secret partner is liable to creditors for partnership debts, even though his name is not included in the written articles of copartnership. 83 Cal. 629.

A surviving partner, under sections 1585

and 2461 of the Civil Code, has power to sue for damages to the copartnership, and do everything necessary to wind up its affairs. 84 Cal. 89.

A joint owner of a crop cannot mortgage his co-owner's interest. 84 Cal. 322.

Stock sold or divided up by a broker among the partners cannot be considered as unlawfully converted. 84 Cal. 256.

See APPEALS; ASSIGNMENT FOR BENEFIT OF CREDITORS; CONTRACTS; FRAUD; JOINT TENANCY; MINING PARTNERSHIP; PROBATE LAW; TRUSTS.

PARTY-WALL.

See EASEMENTS; LICENSE.

PATENT.

See MEXICAN GRANT; MINING CLAIMS; PUBLIC LANDS.

PAYMENT.

A check received in payment is presumed to be only accepted conditionally; and if dishonored, the creditor may resort to his original claim. 78 Cal. 15.

When a check is taken as absolute payment, the creditor takes all the risks. 78 Cal. 15.

A written receipt of payment in full does not prove a positive agreement for absolute payment, when the payment is by bill or note. 78 Cal. 15.

Payment of an accepted order may be enforced without the acceptance being in writing. 87 Cal. 427.

See DEBTOR AND CREDITOR; NEGOTIABLE INSTRUMENTS.

PENALTY.

See CRIMINAL LAW; DAMAGES.

PERFORMANCE.

See ACCEPTANCE; CONTRACTS; DEMANDS.

PERIL OF THE SEA.

See INSURANCE.

PERJURY.

See CRIMINAL LAW.

PERSONAL PROPERTY.

See FIXTURES; FRAUD; PLEDGE; SALES; STATUTE OF FRAUDS.

PHYSICIAN.

"Emergency," within the meaning of the act of April 3, 1876, is where a qualified practitioner is not readily obtainable. 71 Cal. 80.

That a physician irregularly obtained his diploma is not relevant in an action against him for negligence and incompetency. 76 Cal. 304.

See CRIMINAL LAW.

PILOT COMMISSIONERS.

See PUBLIC OFFICERS.

PLACE OF TRIAL.

See CHANGE OF VENUE.

PLEA.

See CRIMINAL LAW.

PLEADING.

- I. GENERALLY.
- II. COMPLAINT.
- III. DEMURRER.
- IV. CROSS-PLEADINGS.
- V. STRIKING OUT.
- VI. ANSWERS.
- VII. AMENDMENT TO PLEADINGS.

I. GENERALLY.

Pleadings must be construed most strongly against the pleader. 78 Cal. 493.

Proofs not supported by a pleading cannot support a judgment. 68 Cal. 32; 84 Cal. 126; 78 Cal. 254. See 73 Cal. 299.

A complaint entire y insufficient may be attacked either by demurrer or motion for judgment on the pleadings, or by motion for a new trial. 68 Cal. 210.

Where there are two separate causes of action, each must be complete in itself, without any regard to the other. 68 Cal. 495.

The time is not essential, under the rule

that the *allegata* and *probata* must correspond. 70 Cal. 639.

Where the facts and the legal conclusions are both pleaded, such conclusions are not part of the allegations of the complaint. 69 Cal. 571. (Two justices dissenting.)

The rule that the *status* which once existed is presumed to continue is not a rule of pleading, but of evidence. 69 Cal. 572.

An allegation that the plaintiff is the owner of certain lands may appear from the context to be a mere conclusion of law; and where certain facts are pleaded, followed by the allegation "that by virtue thereof the plaintiff became the owner," the allegation of ownership is a mere legal conclusion. 73 Cal. 300.

The same averment or statement may be one of fact or conclusion, according to the context. An act, deed, circumstance, or event is none the less a fact because reached as a conclusion of law. 71 Cal. 275. (The distinctions between questions of law and of fact are fully discussed in this decision.)

Where facts are not properly in issue, it is error to admit evidence to contradict the admissions of the pleadings. 73 Cal. 299.

A replication traversing new matter in the answer is unnecessary; such new matter is deemed to be denied or avoided by the plaintiff. The rule applies to counterclaims. 84 Cal. 201.

Where the denials, which ought to be positive, are made on information and belief, judgment on the pleadings is proper, regardless of the fact that some immaterial issues are positively denied. 74 Cal. 298.

A complaint may be amended by striking out the name of the defendant, without filing an amended complaint. 75 Cal. 360.

The court has discretion to permit a pleading to be amended during the trial in the interests of justice. 75 Cal. 519.

Verifications by an attorney can only be made in such cases as are allowed by the code. 78 Cal. 118.

A defense alleged "as by way of cross-complaint" will be construed against the pleader, and treated merely as an answer. 79 Cal. 262.

The rule of pleading still remains, "that pleadings are to be construed most strongly against the pleader." 79 Cal. 262.

It is not necessary that a denial should be in negative language. It may be by way of traverse. An averment of the contrary of what is alleged in the complaint is equivalent to a denial. 80 Cal. 323.

An averment in an answer incompatible with what is alleged in the complaint is equivalent to a denial. 80 Cal. 322.

Where there is an entire absence of a material allegation, the verdict cannot cure such defect. 80 Cal. 505.

The general rules of pleadings as to the use of common counts in executory and executed

contracts discussed and exemplified. 82 Cal. 250.

If the defendant has accepted and enjoyed the benefits of what was done under a special contract, which was, however, departed from, and not done in the time or manner agreed upon, the plaintiff cannot recover upon the contract, but may recover on a *quantum meruit*. 82 Cal. 250.

That which is implied by law need not be averred in a pleading. 82 Cal. 209; 87 Cal. 453.

Verifications by attorney, reasons for, how stated. 83 Cal. 561.

As against special demurrers, the rule applies that a complaint or answer must be construed most strongly against the pleader. 83 Cal. 477.

The *allegata* and *probata* must agree. A complaint by several plaintiffs on a contract cannot support a judgment in favor of only one of them. 78 Cal. 254.

When a demurrer to a complaint has been sustained, and no leave asked for to amend, a judgment for the defendant is properly rendered. 85 Cal. 533.

II. COMPLAINT.

The statement of a cause of action in several counts does not render it open to demurrer. 68 Cal. 277.

Mere matters of surplusage in a complaint cannot operate either for or against its sufficiency. 68 Cal. 277.

A suit against a tax collector must aver his official character. 68 Cal. 495.

In a justice's court a copy of the account is a sufficient complaint, in the absence of a demurrer, and need not be signed by the plaintiff or his attorney. 68 Cal. 407.

An allegation showing coverture, where the same is essential, must be direct, and not by mere implication. 70 Cal. 560.

When a contract is alleged, it will be presumed to have been in writing, if the law requires it to be so. 85 Cal. 131.

An allegation that a will was probated is an allegation that it was admitted to probate. 71 Cal. 254.

In pleading facts showing authority of administrator to sue, the facts of his appointment by an order duly made, his qualifying, and the issuance of his letters are sufficient. 84 Cal. 515.

A plea of former adjudication need not state that the judgment had not been appealed from, or had become final. 84 Cal. 95.

A case proven, but not pleaded, cannot support a judgment, however meritorious. 84 Cal. 126.

A complaint on a promissory note must allege its non-payment. An allegation that it is due, and that defendant refuses to pay, is insufficient. 71 Cal. 123. See 69 Cal. 571.

A defective complaint may be cured by

the averments of the answer supplying the omission. 71 Cal. 28.

A complaint alleging that a certain board of supervisors wrongfully, unlawfully, and illegally allowed and paid out certain moneys states only a legal conclusion. 72 Cal. 520.

Conceding that a tax-payer can bring a suit against the supervisors for misappropriation, his complaint must show a neglect or refusal by the district attorney to bring such suit in the name of the county. 72 Cal. 520.

A certain bill of review in equity held not to state facts sufficient for a cause of action. 83 Cal. 477.

It is error to refuse to allow a plaintiff to prove the contract set up in his complaint, even though the answer contains a written contract deemed to be admitted (because not denied by affidavit) under section 418 of the Code of Civil Procedure. 73 Cal. 273.

A cause of action for labor performed by plaintiff, and for labor performed by his assignor, may be united. 73 Cal. 187.

Where a party is substituted as a plaintiff in a case, he is governed by all the rules that would apply to the original plaintiff. 87 Cal. 23.

An amended complaint takes the place of the original in all matter whatever. 85 Cal. 205.

A complaint to reform a mortgage and enforce it states but one cause of action. 73 Cal. 453.

A complaint upon a contract alleged to be founded on a valuable consideration need not specify such consideration. 73 Cal. 216.

Where a contract is set out *in hæc verba*, and is ambiguous, the pleader must put some construction upon it in his averment. 74 Cal. 313.

In equity, under the general prayer, no relief can be granted not authorized by the pleading. 75 Cal. 434.

Two insurance companies severally liable on the same policy may be joined as defendants in an action to recover for a loss. 75 Cal. 633.

In an action on a policy of fire insurance, the complaint must aver the loss and that it occurred by reason of a peril insured against; but it need not allege performance of the conditions, nor negative prohibited acts, nor show that the risk was not accepted. 75 Cal. 633.

The performance of a condition precedent, required by an insurance policy, may be pleaded under section 457 of the Code of Civil Procedure. 75 Cal. 633.

Allegation that the defendants executed certain notes as copartners held sufficient. 75 Cal. 590.

A complaint to foreclose a mechanic's lien as the property of one man cannot support a judgment therein as the property of an-

other, although both were joined as defendants. 75 Cal. 93.

An agreement required by law to be in writing need not be alleged to be in writing, except where it is essential to the jurisdiction of the court. 75 Cal. 253; 76 Cal. 197; 77 Cal. 330.

A complaint not demurred to will be regarded as sufficient after trial, unless the substantial rights of the parties would be affected by so doing. 76 Cal. 369.

In an action to foreclose a mortgage which specifies that a reasonable attorney's fee is to be allowed, an averment as to what would be a reasonable fee is unnecessary. 87 Cal. 245. See also 87 Cal. 158.

Proof of tenancy in common will not sustain a complaint for relief based on an allegation of partnership. 76 Cal. 44.

A complaint that totally fails to state a breach of the contract sued on, or to allege non-payment, states no cause of action. 80 Cal. 506; 71 Cal. 123; 84 Cal. 197; 84 Cal. 216.

An action on an express contract may on a retrial be changed to one on a *quantum meruit*, and in such case the statute of limitation will not run during the pendency of the action. 76 Cal. 60.

The allegation of the complaint, and not its caption, must determine in what capacity a party is sued. 77 Cal. 257.

A party cannot split up his cause of action even against a county. 77 Cal. 235.

An allegation that plaintiff is the "owner" is of an ultimate fact, unless the context shows it to be a conclusion deduced from the facts alleged. 78 Cal. 543; 77 Cal. 192.

Where a complaint in a suit to quiet title shows the defendant's claim to be valid by implication, it need not be so alleged in terms. 77 Cal. 192.

In a suit on an injunction bond, the complaint must allege non-payment of the money claimed under the contract. 84 Cal. 216.

A complaint for an injunction to restrain the removal of certain appurtenances to a wharf held sufficient. 77 Cal. 285.

Where at the trial the plaintiff admits that his complaint is essentially false, no error in the admission of evidence will entitle him to a reversal. 77 Cal. 392.

A judgment for a party flatly contradictory of his pleadings is improper. 77 Cal. 295.

The fact that a promissory note was executed without consideration is not sufficient cause for equitable relief that it be delivered up and canceled. 79 Cal. 262.

A complaint which only avers ownership of the property sought to be replevined, four years before the date of suit, is clearly bad. 73 Cal. 268.

Where a written contract is set out in full, it is not necessary to allege a consideration. 79 Cal. 606.

Sufficiency of an averment of the presentation of the claim to an administrator. 79 Cal. 224.

A complaint which anticipates an expected defense violates a plain rule of pleading, and is liable to a special demurrer. 80 Cal. 572.

Where the instrument is set forth in the complaint, proper allegations must connect it with the cause of action. 80 Cal. 611.

In pleading a fraudulent conveyance, the facts constituting it must be stated; an attack upon a transfer for fraud must show that at the time of such transfer the debtor had no other property subject to execution out of which his debts could be satisfied. 80 Cal. 631.

The fact that the debtor was known to be insolvent will not vitiate a sale by him made for full consideration. 80 Cal. 631.

A complaint to recover a sum due under an insurance policy must allege that the policy is unpaid, or it will be regarded as fatally defective. 80 Cal. 503.

The rule as to all suits for the non-payment of money claimed under a contract is, that the complaint must allege non-payment. 70 Cal. 75.

A physician or surgeon who has not procured a certificate cannot recover for personal services, the contract being illegal and contrary to public policy. 81 Cal. 370.

A complaint may be sufficient against any demurrer, though unartificially drawn. 71 Cal. 393.

When a defect of form appears on the face of a complaint, it must be objected to by demurrer. 73 Cal. 304.

A complaint stricken out by consent is properly dismissed. 73 Cal. 72.

A new cause of action in divorce dates from the date of the filing, if set up by supplemental complaint. 73 Cal. 106.

His complaint in another action is admissible as evidence against plaintiff. 74 Cal. 191.

A complaint in action for services need not, to state a cause of action, show the time when the services were rendered. 77 Cal. 575.

A complaint on an agreement required to be in writing need not allege that it was in writing. 77 Cal. 330.

An allegation that plaintiff is the "owner" is of an ultimate fact, unless the context shows it to be a conclusion of law. 77 Cal. 192.

A married woman may sue alone to recover money which is her separate property. 81 Cal. 103.

An averment that the vendor duly performed all the conditions of the contract to be performed by him, up to the time of bringing suit, is a sufficient averment of the performance of conditions precedent. 87 Cal. 489.

A complaint upon a promissory note, set-

ting it out in full, with the indorsement showing payment, with proper allegations of a balance unpaid, is not subject to special demurrer for uncertainty. 87 Cal. 158.

A complaint containing several counts upon several debts of a corporation with which a stockholder is sought to be charged must state in each count the existence of the corporation, and the defendant's *pro rata* of the indebtedness. 87 Cal. 29.

A complaint alleging that a deed of trust was void because at the date of the instrument the maker was *non compos mentis* does not sufficiently state the incapacity of the maker under section 38 of the Civil Code, 85 Cal. 177.

A complaint for the rescission of a contract must allege an offer to restore what the plaintiff has received under such contract, or that the plaintiff is ready and willing so to do. 85 Cal. 177.

An allegation that defendant took plaintiff's property, and refusal to return it on demand, sufficiently alleges conversion. 85 Cal. 191.

A complaint to quiet title must allege title; such complaint is not sustained by evidence of prior possession short of that under the statute of limitation. In such case a defendant may show a title in a third person without connecting himself therewith. 85 Cal. 622.

A complaint to rescind a conveyance of land obtained under execution, on the ground of fraud and collusion among the bidders, held insufficient. 85 Cal. 522.

An allegation of the non-delivery of a deed held sufficient. 81 Cal. 38.

An allegation of non-payment held sufficient as against general demurrer. 81 Cal. 60.

Each count of a complaint must state a cause of action and be complete in itself, without reference to any other count. 81 Cal. 127.

A complaint for an accounting, and a temporary injunction against a sale pending the accounting in a trust controversy, held sufficient. 85 Cal. 177.

Several tracts of land may be included in the same complaint to quiet title, where the parties are identical; but the unnecessary cost caused by pleading them in separate counts should be paid by plaintiff. 81 Cal. 127.

An allegation of fraud, in general terms, presents no issue of facts, either in a civil or criminal case. 81 Cal. 158.

The words "wrongfully and unlawfully" are conclusions of law, and tender no issue of fact. 86 Cal. 633.

In an action to enforce an accounting from a trustee, an allegation of fraud is unnecessary when the trustee has denied the trust. 81 Cal. 328.

A complaint on a promissory note need

not set out a copy thereof, if it is set forth according to its legal effect. 82 Cal. 502.

A copy of the note annexed to the complaint as an exhibit forms part of the complaint. 82 Cal. 502.

A written contract may be shown to have been modified by parol. 77 Cal. 418.

Where a vendor refuses to convey, the vendee may treat the contract as at an end, and recover back the money which has been paid, without alleging notice of rescission or demand. 85 Cal. 518.

A complaint against a justice of the peace for false imprisonment for contempt must allege a want of jurisdiction. 86 Cal. 633.

When the complaint is good, and the answer discloses no defense, judgment on the pleadings is proper. 86 Cal. 308.

It seems that the statute of frauds is a matter that must be pleaded as a defense. 77 Cal. 330. But see 79 Cal. 525.

A complaint which alleges a request to expend money, and a compliance with the request, held sufficient as against a general demurrer. 86 Cal. 91.

An amended complaint as against the statute of limitation relates back to the date on which the original complaint was filed. 82 Cal. 654.

In an action on fraud for the rescission of a contract, and restitution, held that it did not state facts sufficient to constitute a cause of action. 82 Cal. 193.

A complaint on a special contract may be amended into an action of *assumpsit*. 82 Cal. 250.

In a suit on a *quantum meruit*, the special contract is admissible in evidence as the standard of value, or as proof of any fact necessary to the recovery. 82 Cal. 250.

A complaint stating the payment to the defendant of a sum of money, for which money the defendant remains indebted, need not allege an agreement to repay, since the law implies such a promise. 82 Cal. 209.

A complaint is not demurrable because it does not show that the cause of action is not barred by the statute of limitation. 82 Cal. 209.

In an action against a bailee, an allegation of non-payment and refusal held sufficient. 82 Cal. 88.

III. DEMURRER.

Immaterial matter which might be left out of the pleadings cannot render it demurrable for ambiguity or uncertainty. 82 Cal. 203.

A demurrer that the complaint is uncertain, ambiguous, and unintelligible must show that the complaint is bad in each of these distinct respects, or it will be overruled. 82 Cal. 209; 87 Cal. 245; 87 Cal. 453.

Uncertainty does not include ambiguity, but refers to the uncertainty defined in the authorities. 82 Cal. 209.

A stipulation that the demurrer be overruled does not waive the right to object that the complaint does not state facts sufficient to constitute a cause of action. 82 Cal. 523.

If a demurrer is well taken on any ground, the appellate court will affirm the order sustaining it, regardless of the reason which the trial court has assigned therefor. 82 Cal. 46.

An objection that the defenses are not separately stated cannot be reached by demurrer. The remedy is by a motion to strike out, or some other appropriate proceeding. 68 Cal. 343.

A demurrer for ambiguity must point out the matter objected to. 68 Cal. 277; 69 Cal. 155.

Where there are several counts, a general demurrer will be overruled if any count is sufficient. 69 Cal. 133.

It seems that an error in overruling a demurrer for misjoinder is not ground for a reversal, where no injury is apparent. 70 Cal. 366; 71 Cal. 183. See 71 Cal. 541; 72 Cal. 555.

An objection for insufficiency of description must be taken by special demurrer. 70 Cal. 560.

A complaint may be inartificially drawn and yet good even against special demurrer. 71 Cal. 393.

It is not a ground of demurrer that two or more causes of action are improperly united in one count. 73 Cal. 187.

An objection for misjoinder cannot be made for the first time on appeal. 73 Cal. 394.

A demurrer in equity for "staleness" may be reached on the ground that the complaint does not state facts sufficient to constitute a cause of action. 73 Cal. 85.

A complaint sufficient, but imperfect, can only be reached by special demurrer. 68 Cal. 57; 71 Cal. 155.

Complaint on foreclosure of mechanic's lien held sufficient as against general demurrer. 70 Cal. 614.

A complaint alleging a nuisance and damages for several distinct injuries therefrom must specify the damages for each injury, or it is demurrable. 70 Cal. 161.

The prayer of the complaint is not ground for demurrer. 71 Cal. 34.

Objections for misjoinder or non-joinder are waived, unless taken by demurrer or answer. 71 Cal. 557.

A defendant has an absolute right to amend his demurrer before the trial of the issue of law thereon. 72 Cal. 520.

The defense of the statute of limitations cannot be taken by demurrer, except it clearly appears on the face of the complaint. 72 Cal. 544.

The caption of a complaint held not cause for demurrer. 72 Cal. 545.

Complaint on a covenant to furnish a full and abundant water right must state for what purpose, or will be ambiguous. 74 Cal. 313.

Where a demurrer to an answer is erroneously sustained, and the answer is amended, such amendment waives the error, unless the amended answer consists of a different defense. 68 Cal. 348.

Error in overruling a special demurrer is not cause for reversal, where such error is without prejudice. 72 Cal. 555; 71 Cal. 183 (in Bank).

An error in overruling a demurrer is cured when the party amends to conform to the objection. 75 Cal. 519.

Objection that the complaint is contradictory must be taken by special demurrer. 77 Cal. 192.

An objection that the complaint is in some matters contradictory cannot be reached by general demurrer. 75 Cal. 633.

Objections to a complaint for uncertainty as to time must be taken by special demurrer. 77 Cal. 575.

A demurrer for ambiguity will not lie for not specifying the items of an account sued upon. The remedy is to demand a copy of the account. 77 Cal. 184.

The omission in a complaint to allege the amount of damages does not render it demurrable if it contains a prayer for a specific amount. 78 Cal. 490.

An objection to the complaint for uncertainty cannot be taken for the first time on appeal. 86 Cal. 191.

When an amended complaint is filed, error in passing on the original complaint is waived. 86 Cal. 445.

The filing of an amended complaint obviates all errors in the ruling as to the original complaint. 86 Cal. 445.

A complaint cannot be demurred to on the ground that it does not show whether the cause of action was barred by the statute of limitation. 78 Cal. 150.

Ambiguity in a complaint in regard to a matter which seems best known to defendant should be disregarded. 78 Cal. 150.

An answer denying mere conclusions and immaterial matters is bad on demurrer. 78 Cal. 95.

A complaint against a sheriff held not ambiguous in showing the capacity in which he is sued. 79 Cal. 600.

Where some of the plaintiffs have authority to sue, a demurrer to a complaint that plaintiffs had not legal capacity to sue is too broad. 84 Cal. 489.

A complaint held to be demurrable because it did not state how the plaintiff was damaged, and for misjoinder of causes and of parties. 79 Cal. 208.

The objection that the plaintiff, as special administrator, had not the legal capacity

to sue held not ground for demurrer. 80 Cal. 257.

A complaint which anticipates an expected defense violates a plain rule of pleading, and is liable to a special demurrer. 80 Cal. 572.

In testing a complaint by a demurrer for uncertainty, the complaint as a whole must be read and construed together. 85 Cal. 619.

The remedy for a misjoinder of two causes of action is by demurrer, and not by motion to strike out. 85 Cal. 1.

A demurrer for misjoinder or for want of capacity to sue should be specific, or it is insufficient. 84 Cal. 489.

The submission of a demurrer without argument is not a waiver of any objection raised thereby. 80 Cal. 505.

A complaint to recover for money expended at defendant's instance and request, but which fails to give any date, is demurrable for uncertainty. 82 Cal. 210.

A general demurrer cannot reach mere defects of form or uncertainty. 82 Cal. 502.

Ambiguity and uncertainty are separate grounds of demurrer, and if conjoined, the pleading must be defective on each ground, or the demurrer will be overruled. 87 Cal. 245; 87 Cal. 453.

The point that the complaint does not show the capacity to sue cannot be taken advantage of by demurrer, but only by answer. 87 Cal. 453.

Sufficiency of complaint against an administrator by a creditor of the estate. 77 Cal. 184.

IV. CROSS-PLEADINGS.

A cross-complaint held improper in a suit by a vendor against a vendee in ejectment. 72 Cal. 1.

Where the facts alleged in a cross-complaint are admitted by the cross-complainant's answer in the same cause, a trial on such issues is wholly unnecessary. 87 Cal. 443.

A cause of action alleging agreement to convey may be set up by cross-complaint in ejectment. 77 Cal. 427.

There is no occasion for a cross-complaint in an ordinary action to quiet title. 83 Cal. 589; 83 Cal. 613. See 83 Cal. 167.

A cross-complaint for a trespass on land and damages is held sufficient. 63 Cal. 277.

A cross-complaint for trespass on land may be filed in a suit for trespass on personal property, where the trespass of land related to or depended on or affected the trespass charged in the complaint. 63 Cal. 227; 69 Cal. 616.

The parties named in the cross-complaint must be the parties to the original action. The fact that one cause of action is joint and the other several renders a cross-complaint improper. 69 Cal. 616.

An answer improperly called a cross-complaint is presumed to be denied. 69 Cal. 133; 75 Cal. 154; 80 Cal. 146.

A pleading called by both parties a cross-complaint, but which is in reality but an answer, need not be denied by an answer. 69 Cal. 618.

Judgment on the pleadings is improper, where the cross-complaint, though not answered, is inconsistent with the material allegations of the complaint. 69 Cal. 133.

A pleading styled "answer to cross-complaint," where there is no cross-complaint, must be disregarded. 72 Cal. 297.

In an action for damages sounding in tort, a cross-complaint is inadmissible. 76 Cal. 11.

When the latter part of an answer is really a cross-complaint, affirmative relief may be granted to the defendants thereon, regardless of what the pleading is called. 77 Cal. 121.

A defense alleged as "by way of cross-complaint" will be construed against the pleader, and treated merely as an answer. 79 Cal. 232; 80 Cal. 146.

A defendant who has filed a cross-complaint is not entitled to judgment on the pleadings, if the answer of the plaintiff states facts which are inconsistent with the allegations thereof, and which, if true, would defeat the right of the defendant. 69 Cal. 134.

Cross-complaint defined and distinguished from an answer and counterclaim. 77 Cal. 121.

A cross-complaint is proper in an action to quiet title, when it seeks to enforce an equity against plaintiff. 87 Cal. 256.

A pleading must specifically show whether intended as a cross-complaint or an answer. If not, it will be construed against the pleader. So held where "for a further and separate answer the defendant filed his cross-complaint, and alleges," etc. 79 Cal. 262; 80 Cal. 147.

A so-called cross-complaint which is only a repetition of the answer requires no denial. 80 Cal. 271. See also 69 Cal. 618; 75 Cal. 154.

In a suit to quiet title, where the defendant relies on title in himself, a cross-complaint is unnecessary, and may be stricken out. 80 Cal. 257.

A cross-complaint cannot be set up against a vendor who sues for possession after forfeiture of contract. 72 Cal. 1.

A cross-complaint setting up the statute of limitation exists in ejectment suits, and the court must find thereon. 84 Cal. 541.

A cross-complaint is proper in a divorce suit. 82 Cal. 413.

See PARTIES.

V. STRIKING OUT.

An objection that separate defenses are not separately stated may be reached by a motion to strike out. 68 Cal. 348.

Striking out is not the remedy for a defectively stated material averment. 76 Cal. 299.

A motion to strike out certain denials may be overruled because of great delay in making it, amounting to a waiver. 77 Cal. 579.

A motion to strike out an unverified answer to a verified complaint should be granted. 78 Cal. 118.

The remedy against changing the nature of the action by amendment is by a motion to strike from the files. 78 Cal. 95.

Improper matter in an answer may be stricken out on motion. 78 Cal. 95.

VI. ANSWERS.

The defense that the consideration for a note is illegal must be specifically pleaded, if not apparent from the complaint. 68 Cal. 29.

A pleading denominated a cross-complaint, but which is a mere defense or counterclaim, is presumed to be denied. 69 Cal. 133.

Under a general denial to a complaint for goods sold and delivered, proof that the debt is not yet due is admissible. 69 Cal. 83.

An answer to a suit on a written instrument set out *in hac verba* admits its due execution unless the denial is verified. 71 Cal. 393.

An answer couched in conclusions of law is insufficient to raise an issue. 71 Cal. 126.

An answer to a suit on a promissory note, denying that plaintiff "is the holder thereof," states merely a conclusion of law, and raises no issue. 72 Cal. 568.

The defense of adverse possession in a suit over a water right may be set up by citing the section of the Code of Civil Procedure under which the right was acquired. 72 Cal. 598.

In a suit over an easement, the defense of the statute of limitation must be made directly, and not by implication, either by citing the appropriate section of the code, or by stating the facts showing that the user commenced and continued under a claim of right, and was peaceable, uninterrupted, open, notorious, and exclusive, and maintained with a knowledge of the original owner. 72 Cal. 75.

A partnership debt cannot be set up as counterclaim against an individual demand. 72 Cal. 224.

Facts, and not mere conclusions of law, should be alleged. 79 Cal. 449; 84 Cal. 142.

A supplemental answer is invalid unless filed by leave of court. 72 Cal. 224.

A counterclaim is invalid unless it existed in favor of defendant when suit was begun. 72 Cal. 224.

A counterclaim may be set up as a defense to one suit even though a suit on such counterclaim has been already begun by a separate action; but in such case the counter-

claimant is not entitled to judgment. 72 Cal. 540.

A denial of a conclusion of law raises no issue. 73 Cal. 299.

Where the facts alleged in the complaint are presumably within the knowledge of the defendant, he must answer them positively; and a denial, on information and belief, will be treated as evasive, and in such case judgment on the pleadings is proper. 74 Cal. 298.

A separate equitable defense, termed a "cross-complaint," may be treated as part of the answer, and not as a cross-complaint. 75 Cal. 154.

The sufficiency as to form of an answer by appeal of an estoppel cannot be reviewed on appeal when it was treated on the trial as sufficient. 76 Cal. 230.

Under a general denial in ejectment, proof is admissible that the plaintiff's deed was void for illegality of consideration. 76 Cal. 208.

When it is apparent that there is but one cause of action for several counts, a finding on only one count is sufficient to support a judgment. 76 Cal. 127.

It is not error to refuse leave to amend an answer on the eve of the trial, after the jury have attended. 76 Cal. 355.

A general denial (unverified), qualified by "such allegations as are hereinafter admitted," will not control an affirmative admission of the facts constituting the cause of action. 77 Cal. 45.

Where a case is tried on the theory that certain issues only are in controversy, it is too late to insist in the supreme court that other issues were in dispute. 77 Cal. 425.

No defense not pleaded can be considered. 84 Cal. 239.

A defendant relying on the statute of frauds must plead it. 77 Cal. 330. But see 79 Cal. 525.

Error in refusing to allow an amendment to an answer is harmless, where all the evidence that could be introduced under such amendment was admitted, and shows no defense. 77 Cal. 69.

The fact that the new matter set up in an amendment to the answer was known at all times to defendant is no reason against allowing it. 77 Cal. 102.

A stipulation may take the place of denial in an answer. 78 Cal. 629.

All the averments of the answer to a complaint in intervention must be presumed to be denied by the intervenor. 78 Cal. 144.

An allegation that the defendant has been injured by the injunction granted in the suit, and praying for damages, is improper. Such matter is only proper on a suit on the injunction bond. 78 Cal. 95.

If the plaintiff relies on a contract within the statute of frauds, a denial of the contract raises the question of its validity. 79 Cal. 525.

A denial on the ground that defendant has no information or belief relative to an alleged paragraph, and for that reason denying all and singular the allegations contained in such paragraph, held sufficient. 79 Cal. 77.

Where two allegations in the same count are inconsistent, the defendant may answer one, and leave the other unnoticed. 80 Cal. 320.

An averment in an answer contrary to or inconsistent with the complaint may be held to raise an issue, in the absence of a demurrer. 80 Cal. 320.

A general denial to an unverified complaint puts in issue every allegation thereof. 81 Cal. 127.

A mere denial of indebtedness is a denial of a mere legal conclusion, and raises no issue. 87 Cal. 444.

In an action to quiet title, the defendant may show up whatever interest he has in the land, legal or equitable. 81 Cal. 127.

An answer showing an interest depending on a condition precedent must allege the performance of such condition, or it is demurrable. 81 Cal. 127.

The defense that another action is pending between the parties for dissolution of co-partnership is invalid in a suit to quiet title. 81 Cal. 127.

Where an answer in slander admits that the words spoken were false, no further proof of their being false is necessary. 81 Cal. 302.

A plaintiff is not required to reply to any new matter or affirmative defense set up in the answer, even where fraud or undue influence is claimed therein. 80 Cal. 88.

Answering an amended complaint waives the objection that it contained a new cause of action which arose after the institution of the suit. 82 Cal. 604.

The right to answer an amended pleading is one of which a party cannot be deprived. Amended pleadings must be served upon a defaulting defendant. 83 Cal. 395.

The court has discretion to allow an intervenor to amend his complaint at the trial. 85 Cal. 438.

It seems that when a party is sued as an original promisor in *assumpsit*, when he is really only a guarantor, that he need not set up this fact in his answer, but may show the same under a general denial. 81 Cal. 280.

Original answer is not admissible as evidence. 68 Cal. 466.

Answer held insufficient, if merely conclusions of law. 71 Cal. 128.

An answer is unauthorized when. 72 Cal. 297.

Leave to file supplemental answers may be on condition of paying twenty dollars costs. 80 Cal. 74.

Supplemental answer is invalid, unless filed by leave of court. 72 Cal. 224.

Qualified answers construed. 77 Cal. 192.

See GUARANTY; INTERPLEADER; INTERVENTION.

VII. AMENDMENT OF PLEADINGS.

A complaint cannot be amended by the trial court pending an appeal or after the case has been decided against the appellant. 68 Cal. 604. In such case a writ of prohibition lies. *Id.*

Nor can the judgment affirmed be altered or set aside. 72 Cal. 161.

Where the complaint is amended, the defendant may amend as a matter of right, and even plead the statute of limitations. 68 Cal. 366.

Additional parties may be brought in by amendment. 68 Cal. 419.

An answer which has been amended is inadmissible as evidence for plaintiff. 68 Cal. 466. So of complaint amended (71 Cal. 126) as evidence for defendant.

Amendment to pleading is generally within the discretion of the trial court. 69 Cal. 200; 76 Cal. 11; 80 Cal. 440; 81 Cal. 81.

An information cannot be amended at the trial. 69 Cal. 184.

Where general leave to amend is given, additional parties may be joined. 70 Cal. 507.

Amendment to answer may be made at any time, even at close of trial, on leave of court. 70 Cal. 374; 80 Cal. 440. So, also, of complaint. 75 Cal. 519.

A refusal to allow defendant to amend, not in respect to new matter, held not error. 70 Cal. 286; 76 Cal. 355; 76 Cal. 11.

Amendment to statement on motion for a new trial held not presented in time. 70 Cal. 548.

The court may allow a second amended complaint. 73 Cal. 550.

Amendments setting up new matter held not to change the nature of the action. 70 Cal. 507.

The court may refuse to allow amendments during trial. 71 Cal. 537.

Amendment to complaint waives error in sustaining a demurrer thereto. 71 Cal. 541.

A judgment may be amended in peculiar cases. 71 Cal. 586.

When a judgment is reversed for insufficiency in the pleading, the party will be allowed to amend. 86 Cal. 322.

A demurrer may be amended as a matter of course. 72 Cal. 520.

The return showing service of summons may be amended at any time in a justice's court. 72 Cal. 562.

Affidavit for attachment cannot be amended. 72 Cal. 494.

Amendment to answer cannot be made by entry on the minutes, or by mere stipulation. 72 Cal. 86.

Amended complaint as to original parties dates from commencement of action by relation. 73 Cal. 452.

An amendment to statement for new trial, if adopted, may be presented to the judge for settlement, within any reasonable time. 73 Cal. 475.

Statement on motion for a new trial may be amended under section 473 of the Code of Civil Procedure. 73 Cal. 205.

Pleadings may be amended pending motion for a nonsuit. 74 Cal. 191.

Pleadings may be amended by striking out the name of a party, without a new filing. 75 Cal. 360.

The substitution of a legal representative for a deceased party by suggestion requires no amendment to the complaint, but in such case the order is part of the judgment roll. 86 Cal. 556.

The allowance of amendments is in the discretion of the court, but such discretion ought not to be exercised in favor of an unconscionable demand. 86 Cal. 114.

The court may permit an answer to be amended after the jury is impeached. 86 Cal. 416.

It seems a notice of intention to move for a new trial may be amended by leave of court. 75 Cal. 650.

Proof of service of summons may be amended after judgment. 75 Cal. 213.

Refusal of an application to amend an answer at the trial, so as to prevent a judgment on the pleading for insufficiency of denial, held error. 85 Cal. 518.

After leave to amend a sufficient complaint, the plaintiff has the option of not amending, and in such case judgment by default cannot be taken against him. 76 Cal. 301.

Amendment to statement on motion for a new trial, how made. 76 Cal. 594.

A party's name may be amended, even after judgment. 76 Cal. 257.

Refusal to allow held improper. 83 Cal. 579.

The addition of new parties defendant is an amendment of pleadings in the matter of substance, which opens the default on the original pleadings. 86 Cal. 393.

Error in filing amendment changing nature of action can only be reached by motion to strike from the files. 78 Cal. 97.

It is always within the discretion of the court to allow an amendment to the answer, detailing more fully the facts on which the defense relies. 85 Cal. 90.

Amendment should be allowed with great liberality, but not when it could not affect the result of the trial. 77 Cal. 73.

Permission to amend an answer at the trial in a foreclosure suit held proper, without any showing as to diligence. 85 Cal. 90.

Amendments to pleadings may render "the law of the case" inapplicable. 82 Cal. 250.

Amendment to proceedings or pleadings is largely discretionary with the court. 82 Cal. 502.

When a demurrer to complaint is sustained, the plaintiff must obtain leave to amend, or have judgment entered against him. 82 Cal. 539.

See **DEFAULT; PRACTICE.**

PLEDGE.

The fact that after delivery the pledgor assisted in taking care of the property will not invalidate the lien as against creditors. 71 Cal. 214.

A mere agreement to pledge, without delivery, does not constitute a pledge in favor of any one. 71 Cal. 331.

A pledgee in an action against a sheriff to recover the pledged property cannot avail himself of a title acquired subsequent to the levy. 73 Cal. 526.

A pledgee of stock can retain it until his debt is paid, but cannot in the mean time acquire title under the statute of limitation. 73 Cal. 302.

A pledgee of personal property has the right of possession until the debt is paid. 74 Cal. 250.

The lien of the pledgee is extinguished when a tender of the amount due is made. 74 Cal. 250.

A plea of tender in the matter is good, without bringing the money into court, and a previous refusal to pay cuts no figure. 74 Cal. 250.

The pledgee is liable to the pledgor for the depreciation in the value of the property after a tender of payment. 74 Cal. 250.

The liability of the pledgee may be enforced in trover or by a bill of redemption. 74 Cal. 250.

The pledgee of a promissory note executed without consideration can only hold the maker for the amount of the debt for which it was pledged. 75 Cal. 86.

The unauthorized use of personal property as a pledge may be ratified. 76 Cal. 171.

Where a pledgee purchases the property at a sale with the knowledge of the pledgor, the latter may treat the transfer as valid, provided he does so within a reasonable time. 77 Cal. 267.

An election to regard the sale to the pledgee as valid or invalid cannot afterwards be rescinded. 77 Cal. 267.

Pledged property is attachable for want of continuous change of possession. 79 Cal. 192.

In an action for the conversion of articles pledged, the indebtedness secured by the pledge is a proper set-off. 79 Cal. 273.

A finding that the articles described in the complaint were pledged is a sufficient description in the findings. 79 Cal. 273.

An attempt to pledge another's property without his knowledge creates no lien. 81 Cal. 106.

Ostensible agency can only be inferred from the ratification of similar acts of the agent. 81 Cal. 106.

A pledge of stock of a decedent in a home-steal association may be foreclosed without presentation of the claim against the estate. 83 Cal. 440.

The sale of pledged property by the pledgee must be made like sales under execution; authority to waive statutory requirements must be strictly construed. 82 Cal. 199.

See **DELIVERY; FORECLOSURE; INTERVENTION; LIEN; SALE; STATUTES OF FRAUDS.**

POINTS AND AUTHORITIES.

See **APPEAL; PRACTICE.**

POLICE COURT.

See **CONSTITUTIONAL LAW; CRIMINAL LAW; JURISDICTION; MUNICIPAL CORPORATIONS.**

POLICE POWERS.

See **COUNTIES; CRIMINAL LAW; MUNICIPAL CORPORATIONS.**

POSSESSION.

See **ADVERSE POSSESSION; EJECTMENT; FORCIBLE ENTRY; QUIETING TITLE; SALES; STATUTE OF LIMITATIONS.**

POSTPONEMENT.

See **AGENCY; CONTINUANCE; CRIMINAL LAW.**

PRACTICE.

After a suit has been tried and submitted, it cannot be dismissed. 68 Cal. 246.

A court may stay all proceedings after trial, until the successful party pays the jurors and reporter's fee. 68 Cal. 199.

A judge who tries a case for another may, while out of the county, grant an order extending the time to prepare a statement. 68 Cal. 638.

An action will not be dismissed because, when commenced, another such action was

pending, if such action was afterwards dismissed by stipulation. 69 Cal. 637.

It is an abuse of discretion to refuse to permit an answer to be filed after statutory time, when a stipulation to that effect had been signed, but not filed. 71 Cal. 461.

When the last day in a stipulation falls on a Sunday, it includes Monday. 71 Cal. 461.

Where the record on appeal does not show any objection to the mode of procedure, it will be presumed to have been consented to. 71 Cal. 223.

A motion for nonsuit must specify the grounds. 74 Cal. 530.

Where a cause is submitted on briefs, points not made in the opening brief may be considered as waived. 74 Cal. 11.

Parties cannot, by agreeing on a statement of facts, invoke the aid of the court on moot questions of law. 74 Cal. 430.

An objection to a question that it was irrelevant and immaterial held sufficient. 74 Cal. 323.

An order refusing to allow an amendment to a statement, on the grounds of accident and mistake, will not be reversed, when the evidence as to such accident or mistake is conflicting. 75 Cal. 650.

A defendant who appears specially to strike out a complaint, and asks for an extension of time until the motion is decided, does not waive service of summons. 75 Cal. 237.

An amended complaint cannot be served on an attorney before he appears. 75 Cal. 237.

Judgment on the pleadings is proper, where the answer denies merely a conclusion of law. 87 Cal. 443.

Where a contract for sale is rescinded by the vendor, no demand is necessary to recover back from him the purchase-money paid. 87 Cal. 443.

A contract for the sale of a farm for a certain sum, and one half of so much additional as it can be resold for, does not require an actual resale to ascertain the amount of the purchase price. 87 Cal. 461.

The non-insertion of defendant's true name will not render the judgment subject to a collateral attack. 75 Cal. 134.

A trial court that has jurisdiction cannot set aside its own decision, except as provided by statute. 75 Cal. 596.

Orders or judgments improvidently made may be set aside; but that such was the fact must be affirmatively shown, otherwise the action will be annulled on *certiorari*. 75 Cal. 596.

A petition to supreme court to settle a bill of exceptions must be specific. 75 Cal. 229.

A refusal to dismiss an action because summons was not served for twenty months is not an abuse of discretion. 76 Cal. 577.

Where a case is made out at variance with that of the complaint, the objection should

be to the evidence, or by a motion for nonsuit specifying the grounds. 85 Cal. 1.

A court may refuse to permit an amended answer to be filed, not substantially different from one already made. 76 Cal. 11.

Service on attorney by mail can only be made in accordance with the statutes providing therefor. 76 Cal. 618.

Section 581 of the Code of Civil Procedure, relating to entry of judgment, construed. 77 Cal. 458.

An entry in a clerk's register does not constitute a dismissal. The action is not dismissed, so as to deprive the court of control, until the judgment has been entered. 77 Cal. 83.

When a demurrer is overruled, and time to answer is given, notice of the decision must be given, and such time dates from the date of the notice. 77 Cal. 150.

Any order obtained by means of artifice or trick may be set aside by the court. 77 Cal. 83.

Orders setting aside defaults will not be disturbed except in cases of gross abuse. 77 Cal. 150.

Counsel have a right to read all the pleadings to the jury, and cannot be restrained by the court from discussing the case in all its bearings. 77 Cal. 410.

A statement for a nonsuit, "that plaintiff has failed to prove any allegation of his complaint," is sufficiently specific. 79 Cal. 82.

A motion for a nonsuit on the grounds of plaintiff's failure to prove any of the material allegations of his complaint is insufficient. 81 Cal. 39.

A motion for a nonsuit that does not specify may be disregarded. 80 Cal. 257; 79 Cal. 200.

Defendants in an action brought by a city need not verify their answer if the complaint is not verified. 80 Cal. 57.

Amendment to answer held properly allowed. 80 Cal. 440.

A judgment by default may be set aside unconditionally. 80 Cal. 415.

A nonsuit is improper where there is any evidence tending to sustain a plaintiff's case. 81 Cal. 540.

All the evidence admitted must be considered on a motion for a nonsuit. 81 Cal. 87.

A motion for a nonsuit may be renewed, even after defendant has opened his case. 79 Cal. 97.

When the evidence for plaintiff tends to prove his case, a nonsuit should not be granted. 83 Cal. 219.

The cases 61 Cal. 461 and 73 Cal. 25, that hold that notice of appeal can only be served by mail when mailed where the person serving it resides, are overruled, as based on an erroneous construction of sections 1012 and 1013, Code of Civil Procedure. 83 Cal. 574.

A sworn answer may operate as an affidavit of merits. 83 Cal. 128.

Instance where relief ought to have been granted from a judgment by default on the ground of excusable neglect. 83 Cal. 126.

Applications for continuance are addressed to the sound discretion of the court. 83 Cal. 645.

"Orders" defined, as distinguished from judgments. 83 Cal. 225.

A ruling on the admission of evidence, in the absence of a party, will not be deemed excepted to. 83 Cal. 225.

It is the duty of the court, when only one side is represented, to insist on the best evidence. 83 Cal. 225.

Where a case is tried upon the theory that the issues are properly joined, without objection, it is too late to raise the objection on appeal. 83 Cal. 633.

Disobedience to a notary's subpoena, to justify the striking out of a complaint under section 1991 of the Civil Code, must be clearly willful and intentional. 84 Cal. 528.

When the evidence claimed to be insufficient to justify the decision is specified in the statement, it is presumed to constitute all of the evidence. 84 Cal. 505.

A misdescription of a defendant as "executor," instead of administrator, will not invalidate a summons in an action to foreclose a street assessment. 84 Cal. 27.

A decision of the supreme court is not even authority, except on a point actually passed upon by the court, and directly involved in the case. 84 Cal. 143.

No other grounds except those specified in the motion can be considered in hearing a motion for a nonsuit. 82 Cal. 577.

Postponement of a trial on the ground that the defendant has been allowed to amend his answer, so as to require additional witnesses on the part of the plaintiff, may be refused, where the motion to postpone is not supported by affidavits. 85 Cal. 304.

Exceptions not referred to in argument or brief will be considered as waived. 82 Cal. 128.

A petition for rehearing must reach the hands of the court within thirty days after judgment; mere filing within that time is not sufficient. 82 Cal. 595.

A stipulation entered into by mistake may be set aside under section 473 of the Code of Civil Procedure. 82 Cal. 502.

Refusal of an application to amend an answer at the trial, so as to prevent a judgment on the pleadings or insufficiency of denial, held error. 85 Cal. 518. See also 85 Cal. 93.

An application to vacate a judgment by default is directed to the discretion of the court. Such discretion should be freely and liberally exercised, so as to dispose of cases on their substantial merits. 85 Cal. 116.

The fact that a defendant and his attorney were not present at the trial because they had no notice that it had been set for trial,

until too late to be present, shows a case of excusable neglect, so as to justify an order vacating the judgment. 85 Cal. 116.

On a petition to prove an exception, leave will be denied where the allegations of the petition are not established by a preponderance of evidence. 85 Cal. 214.

The court has discretion to open a case before its final decision, so that a deed inadvertently omitted may be introduced in evidence. 85 Cal. 622.

The court will presume on demurrer that private transactions have been fair and regular, and that a deed was placed in escrow pursuant to the terms of a contract. 85 Cal. 58.

A legal representative may be substituted for a deceased party by suggestion. This requires no amendment to the pleading, but the order making it becomes part of the judgment roll. 86 Cal. 555.

A motion to set aside a judgment by default, where there is no affidavit of merit or no excuse for unreasonable delay, is without merit. 86 Cal. 556.

A motion for a nonsuit need not specify the grounds, where the plaintiff's case is incurable. 86 Cal. 114.

The discretion of the court should not be exercised to allow amendments to a pleading, in favor of an unconscionable demand. 86 Cal. 114.

The court has discretion to refuse to allow a pleading to be amended, after a demurrer thereto has been sustained. 86 Cal. 597.

A court may permit an answer to be amended after the jurors are impaneled. 86 Cal. 416.

The verdict in an equity case is only advisory to the court until adopted. 87 Cal. 413.

After the court sets aside a verdict in an equity case, it may allow both parties to introduce additional evidence. 87 Cal. 413.

It may be difficult to define what is meant by abuse of judicial discretion. One of the essential attributes is, that it must plainly appear to effect injustice. 87 Cal. 413.

An order sustaining a demurrer need not give leave to amend, if leave was not requested. 82 Cal. 533.

Where the persons are sued jointly upon a joint contract, several judgments may be given. 82 Cal. 577; 78 Cal. 254.

See CONTINUANCE; DEFAULT; DISMISSAL; PLEADING; TRIAL.

PRESUMPTIONS.

See EVIDENCE.

PRIVILEGED COMMUNICATIONS.

See EVIDENCE; LIBEL; SLANDER.

PROBABLE CAUSE.

See CRIMINAL LAW; MALICIOUS PROSECUTION.

PROBATE LAW.

- I. ADMINISTRATORS AND EXECUTORS.
- II. CLAIMS AGAINST ESTATE.
- III. HEIRS AND DEVISEES.
- IV. PROBATE PRACTICE.
- V. PROBATE SALES.
- VI. PLEADINGS AND CONSTRUCTIONS.
- VII. STATUTE OF LIMITATIONS.
- VIII. VACANCIES.
- IX. SURVIVING PARTNERS.
- X. MANAGEMENT OF ESTATES.
- XI. HOMESTEAD AND FAMILY ALLOWANCE.
- XII. APPEALS IN PROBATE CASES.

I. ADMINISTRATORS AND EXECUTORS.

A special administrator indebted to the deceased must charge his account against himself in settlement. 69 Cal. 239.

After the issue of letters testamentary, a special administrator cannot be appointed without a vacancy. 70 Cal. 343.

The marriage of an executrix does not, of itself, render her office vacant. 70 Cal. 343.

An executor cannot claim commission for land included in the inventory, which did not really belong to the estate. 70 Cal. 69.

A judgment of a foreign state is simply record evidence of a debt, and a judgment in favor of a foreign executor obtained in another state may be the basis of a suit brought by her in her individual capacity. 70 Cal. 403.

In action to quiet title against an estate, both the executor and heirs are proper parties. 70 Cal. 509.

An administrator who unduly influences an heir to transfer his interest to him, and obtains distribution to himself, becomes his involuntary trustee. 71 Cal. 105.

If the administrator has a mortgage on the estate, and assigns it for the sole purpose of foreclosure, a suit for such foreclosure cannot be maintained. 71 Cal. 193.

An administrator may charge for the necessary traveling expenses of his attorney. 72 Cal. 335.

An administrator may bring an action to quiet title. 81 Cal. 127.

An administrator is not entitled to an allowance for services to any one, which he should have rendered himself, or caused by his neglect of duty, or by his unreasonable delay in settling the estate. 72 Cal. 343.

In such case, evidence that the expense was necessitated by such delay is admissible. 72 Cal. 343.

A surviving wife, though a non-resident,

has power to nominate an administrator. 73 Cal. 164.

An executor who turns money over to the control of his co-executor without good reason is liable for misapplication of it by the latter. Good faith is not a sufficient excuse. 87 Cal. 1.

A neglect to account which results in waste renders executors jointly and severally liable, the same as failure to collect debts before the statute of limitations has run against them. 87 Cal. 1.

An administrator is liable for property lost through neglect, and with interest on the trust funds mingled with his own and omitted from his account. 73 Cal. 547.

The administrator, the heirs, and the devisees may properly join in a suit to quiet title, as plaintiffs. 80 Cal. 257.

If a second administrator omits to collect from his predecessor, it does not release his predecessor's bonds. 73 Cal. 423.

In a contest to determine heirship under section 1664 of the Code of Civil Procedure, the administrator should remain passive, and is no party to the contest. 73 Cal. 231.

When an executor renounces his right, letters of administration must issue under section 1365 of the Code of Civil Procedure. 74 Cal. 338.

One who has an unsettled partnership account cannot be an administrator. 74 Cal. 338.

An executor is only liable for a debt when he neglects its collection. 74 Cal. 199.

Allowance of traveling expenses of the administrator and his attorney held proper. 80 Cal. 166.

Exceptions to an executor's account should not be submitted to a jury for trial. 74 Cal. 199.

A release of one executor does not discharge the other; his liability is separate. 74 Cal. 191.

An executor guilty of great delay is chargeable with legal interest. 74 Cal. 199.

An executor's obligation to account cannot outlaw. 74 Cal. 199.

An executor who sells property without an order of the court is guilty of conversion, and liable for its value, with interest. 74 Cal. 536.

Part al distribution cannot be granted on the petition of the executor. 74 Cal. 311.

An administrator has a right to prosecute an appeal taken by his predecessors in office. 77 Cal. 555.

Failure to present a claim to the administrator does not release the sureties thereon; the debt is not extinguished, but barred. 77 Cal. 54.

A special administrator cannot allow or pay claims against an estate; the order appointing him must specify his powers. 78 Cal. 300.

An order appointing a new administrator

presumes that the account of the old one has been settled. 78 Cal. 581.

A widow, as administrator, becomes incapable by marriage. 78 Cal. 582.

The acts of an administrator who has never duly qualified are invalid to defeat or acquire any rights. 79 Cal. 14.

A non-resident executor may, though absent, apply for letters through his attorney, but he must appear and act as executor in a reasonable time. 80 Cal. 381.

The appointment of a new administrator, if consented to, is equivalent to the acceptance of the resignation of the old one. 80 Cal. 8.

An administrator has no authority to carry on the business of the deceased; if he does so, it is at his own risk. 80 Cal. 166. Such business cannot be reported in the official account, but separately, if at all, and his conduct therein, if fraudulent, may be investigated in a civil suit. *Id.*

Administrators are not entitled to commission until settlement of their final account. 80 Cal. 166.

Pending an appeal from an order removing an administrator, a special administrator may be appointed. 86 Cal. 72.

An administrator should not be removed except for good and sufficient cause. The removal in a certain case held to be unjust and improper. 86 Cal. 179.

A gift made to the executrix held not chargeable to her in her account of the estate. 83 Cal. 322.

A court cannot remove an executor without giving him an opportunity to be heard. 83 Cal. 583.

An executor is not liable to a personal action by the devisees. 83 Cal. 290.

A bill in equity will lie against an executor to enforce a trust against the estate, without a previous demand. 85 Cal. 137.

The decree of the probate court settling the executor's account is conclusive against all parties interested who are not under liability. 83 Cal. 290.

An executrix will be presumed to have performed her official duty. 83 Cal. 290; 83 Cal. 583.

Evidence held sufficient to constitute a voucher on a final accounting. 83 Cal. 423.

It is the duty of an executor to collect and account for the foreign assets of the testator. 86 Cal. 306.

Executors should be charged with legal interest when the settlement of the estate has been delayed for an unreasonable time. 83 Cal. 423.

When it is sought to remove an executor for long delay in settlement, the petition must show injury or negligence by reason of such delay. 83 Cal. 583.

It is error to reject the petition of a creditor whose claim has been allowed, where all the material allegations for such a peti-

tion have been averred and proven. 87 Cal. 480.

II. CLAIMS AGAINST ESTATE.

Action by heirs to recover property sold by an illegal administrator must be brought within three years after the sale. 68 Cal. 95.

A mere omission in the affidavit of claim may be explained by the account itself. 69 Cal. 79.

Where the executor is in doubt as to a claim, it may be left to arbitration, or by stipulation to the court, under section 1507 of the Code of Civil Procedure. 69 Cal. 80.

An allowed claim against the estate, after settlement, bears legal interest until paid. 70 Cal. 181.

A claim for services rendered by a married woman is community property, and should be presented by her husband. 70 Cal. 424.

A bequest intended as payment for services is renounced by the presentation of a claim for such services. 70 Cal. 424.

If the administrator has a mortgage on the estate, and assigns it for the sole purpose of foreclosure, a suit for such foreclosure cannot be maintained. 71 Cal. 193.

A party who claims against an estate may testify as to the correctness of his books of account, if within his personal knowledge; but he cannot directly testify as to the indebtedness. 71 Cal. 375.

A complaint against an executor must in every case allege and prove the presentation and rejection of the claim. 72 Cal. 17.

An executor cannot reject a claim against the estate secretly; if he does so, his action is a nullity. 72 Cal. 187.

A claim of an attorney for services to the administrator may be presented to him and allowed by the court, in like manner as a claim against the estate, and the order directing payment thereof is appealable. 72 Cal. 487.

A claim allowed against an estate has the force and effect of a judgment payable in due course of administration. It is the duty of a claimant whose claim is allowed in part to file the same in court; such action cannot estop him from suing for the disallowed portion. 85 Cal. 137.

A claim once presented cannot be amended after the statutory time for its presentation has expired. 72 Cal. 549.

An allowance by the judge of a claim may be afterwards set aside on an *ex parte* motion. 72 Cal. 549.

The statute of limitation does not run during administration against a claim which has been allowed. 85 Cal. 151.

After a claim is allowed, it draws legal interest. 74 Cal. 567.

The claim of an attorney for services, employed by the heirs to hurry up administration, is not a charge against the estate. 75 Cal. 346.

The rule forbidding a person from being a witness in his own behalf in a suit against an estate does not prevent him from testifying in his own defense in a suit brought against him by an executor or administrator. 67 Cal. 149.

In an attorney's suit against an estate, for services rendered to decedent, the plaintiff is not precluded from testifying as to the mere value of professional services. 77 Cal. 410.

In suit against administrator on account, section 454 of the Code of Civil Procedure governs. 77 Cal. 184.

Where the homestead is on the separate property of the survivor, the mortgage on it need not be presented as a claim if all claim against the estate is waived. 77 Cal. 54; overruling 62 Cal. 217.

A vendor's demand for real property held by decedent under a contract of purchase need not be presented to administrator as a claim. 77 Cal. 558.

A person whose claim has been disallowed by the administrator is not a creditor within the meaning of section 1590 of the Code of Civil Procedure. 85 Cal. 545.

Attorneys appointed by the court are entitled to their fees for services rendered on appeal to the supreme court. 78 Cal. 625.

Such fees are no part of the cost bill. 74 Cal. 533; 78 Cal. 625.

Such fees should be fixed and allowed by the superior court, even when the services are rendered in the supreme court. 70 Cal. 21; 71 Cal. 330; 78 Cal. 625.

A judgment against an executor should be made payable only in due course of administration. 85 Cal. 559.

The defense that the claim has not been presented to the administrator is a defense by way of abatement, which, if not set up, is presumed to be waived. 85 Cal. 559.

Notice to creditors may designate the executor's attorney's office as his place of business. 79 Cal. 7.

Pleading the presentation of a claim held sufficient as against general demurrer. 79 Cal. 224.

When recourse to the rest of the estate is waived, a mortgage need not be presented as a claim. 79 Cal. 409.

A claim presented against an estate must be sworn to as the law requires; any deviation is fatal. 86 Cal. 348.

On foreclosing a mortgage under section 1500 of the Code of Civil Procedure, there must be an express waiver of all recourse against the estate for a deficiency. 86 Cal. 322.

A joint claim against two persons, one of whom is dead, need not be presented as a claim against the estate of the decedent in order to be valid against the survivor. 86 Cal. 434.

Claims against an estate, sufficiency of statement in 81 Cal. 56.

A mortgage debt may be presented to prevent its outlaw, without bringing suit for foreclosure subsequently. 82 Cal. 96.

Costs as counsel fees in foreclosure suits against estate. 82 Cal. 96; 82 Cal. 102.

Crop mortgage securing future advances. 82 Cal. 96; 82 Cal. 102.

III. HEIRS AND DEVISEES.

In California, the title of the devisee is vested, subject only to a lien for the payment of debts and expenses of administration. 69 Cal. 158.

A judgment against a devisee is a bar to a suit brought by such devisee as executor. 69 Cal. 158.

A devisee in possession can maintain an action for trespass. 69 Cal. 158.

Under the constitution, non-resident foreigners are not precluded from the same rights to succession as residents. 70 Cal. 153.

A judgment against an executor after he has resigned does not bind the heirs. 70 Cal. 339.

A judgment under which an heir receives the proceeds of a probate sale estops her from contesting the validity of such sale. 70 Cal. 362.

In an action to quiet title against an estate, both the executors and the heirs are proper parties. 70 Cal. 507.

An administrator who unduly influences an heir to transfer his interest to him, and obtains distribution to himself, becomes his involuntary trustee. 71 Cal. 105.

A *bona fide* assignee of a legatee stands in his shoes, and is entitled to distribution. 71 Cal. 285.

Heirs who are cognizant of the fraud of an executor before final settlement cannot afterwards maintain an action against him. 72 Cal. 313.

In order to disinherit a child, the will itself must show that the testator had the child in mind when he made it. 83 Cal. 322.

In an action to foreclose a street assessment, the heirs and devisees are the only necessary defendants. 72 Cal. 229.

Failure to open a default against heirs, in a contest to establish heirship, will not be reviewed on *certiorari*. 73 Cal. 295.

In a contest to determine heirship under section 1664 of the Code of Civil Procedure, the administrator should remain passive, and is no party to the contest. 73 Cal. 281.

Where a cause of action is barred against an executor by the statute of limitation, the claim of the heir or devisee is also barred, even though he has been a minor when the action accrued. 73 Cal. 329.

A decree of distribution is not void because it does not describe all the lands distributed. 83 Cal. 344.

Pending probate proceedings, a person claiming to be an heir, but who is not a devisee himself, cannot maintain an action in equity to determine his heirship, where no cause is shown that this should be done prior to distribution. 73 Cal. 560.

The title of a third person cannot be decided in a decree of distribution. 74 Cal. 523.

A legatee is not concluded from asserting an adverse claim against a distributee. 74 Cal. 523.

Proceedings begun to contest a will by a minor without a guardian *ad litem* are not void for want of jurisdiction. 74 Cal. 52.

A person who holds an adverse title is not estopped by probate distribution. 74 Cal. 512.

The claim of an attorney for services rendered to the heir in hurrying up administration is no charge against the estate. 75 Cal. 346.

The possession of the administrator is not adverse to the heir, but he is in privity with and represents both heirs and creditors. The heir has the right to the title and possession, subject only to the right of the administrator, and may maintain an action to recover possession, or may convey his title while administration is pending. 85 Cal. 155.

One half community property belongs to surviving wife, and entire community to surviving husband. 76 Cal. 649.

A distributee cannot be compelled to account for property in a foreign state. 77 Cal. 220.

Cases in which a husband inherits all the estate of his deceased wife. 78 Cal. 586.

A party who has no interest in the matter cannot complain of a probate order. 78 Cal. 136.

The remedy for an erroneous decree of final distribution is by appeal, and not by a suit in equity. 86 Cal. 553.

The pendency of a proceeding to decide heirship under section 1604 of the Code of Civil Procedure is not cause to compel continuance of a petition for distribution; both may be heard simultaneously. 78 Cal. 109.

Under section 377 of the Code of Civil Procedure, either the heirs or the personal representative of a deceased person can bring suit for damages for his death, but both cannot maintain actions; a recovery by one may be pleaded as a bar to a suit by the other. 86 Cal. 142.

The doctrine of *cy-près* applied. 78 Cal. 141.

Attorney's fees are not allowable to administrator in a contest between heirs. 80 Cal. 623.

A judgment in ejectment for or against an administrator operates as an estoppel in favor of or against the heir and his grantees. 85 Cal. 155.

A decree granting to the grantor of an

heir certain property can only give him such rights as the heir could transfer. 81 Cal. 571.

The probate court has jurisdiction on a petition for distribution to determine contested heirship. 81 Cal. 403.

To what extent a decree of distribution is conclusive on heirs, devisees, or their assigns. 82 Cal. 68.

See ELECTION; WILLS.

IV. PROBATE PRACTICE.

The court may set aside an order for final discharge of an executor. 68 Cal. 398.

Where the executor is in doubt as to a claim, it may be left to arbitration, or by stipulation to the court, under section 1507 of the Code of Civil Procedure. 69 Cal. 79.

The law, as it existed at the time of testator's death, governs. 70 Cal. 14.

After six months, a decree settling a final account cannot be set aside on the ground of inadvertence, except by a suit in equity. 70 Cal. 604.

A person claiming adverse title cannot be compelled to surrender property to the executor; his refusal is not contempt. 71 Cal. 289.

An executor can recover property transferred by the decedent, but which transfer is void for want of immediate delivery or continuous change of possession. 70 Cal. 550.

The settlement of an estate is a proceeding *in rem*, and requires no personal notice to the parties interested. 72 Cal. 591.

An order allowing a final account is a final judgment, and operates as an estoppel. 72 Cal. 314.

A trial by a jury on a contest over the account of an administrator is not a matter of right, and is merely advisory. 72 Cal. 335.

In such cases irregularity or error in instructions is immaterial. 72 Cal. 335.

A claim of an attorney for services to the administrator may be presented to him and allowed by the court, in like manner as a claim against the estate, and the order directing payment thereof is appealable. 72 Cal. 487.

Where the probate of a will is revoked, the judgment should annul all proceedings. 73 Cal. 555. In such case the probate must be amended not only as to the contestant, but to all parties in interest. 73 Cal. 553.

When an executor renounces his right, letters of administration must issue under section 1355, Code of Civil Procedure. 74 Cal. 338.

A jury in a contest over a will must return a special verdict upon the issues submitted to them. 74 Cal. 353. In such cases, the verdict must not be couched as conclusions of law. *Id.*

An order refusing to vacate a decree of distribution is not appealable. 83 Cal. 619.

Findings will be presumed to be waived unless the record shows otherwise. 74 Cal. 199.

Exceptions to an executor's account should not be submitted to a jury for trial. 74 Cal. 199.

Proceedings begun to contest a will, by a minor without a guardian *ad litem*, are not void for want of jurisdiction. 74 Cal. 52.

The account of an administrator cannot be settled before it is filed. 75 Cal. 419.

Probate court may require a person who admits being a surviving partner to file his account, but cannot settle the same, nor if the partnership be disputed, determine it. 75 Cal. 463.

An appeal from a decree of distribution must be taken within sixty days. 83 Cal. 619.

Appointment of an attorney for absent heirs, and his allowance therefor, are matters entirely within the discretion of the court. The order in such case may be modified or vacated at discretion. 75 Cal. 256.

An action in equity may be brought to subject trust property to administration. 79 Cal. 490.

A decree of distribution may be set aside within six months for fraud, mistake, inadvertence, or surprise. 80 Cal. 144.

Attorney fees are not allowable to administrator in a contest between heirs. 80 Cal. 525.

A single referee may be appointed to make partition by consent. 80 Cal. 490.

A decree may set apart an estate to the heirs in undivided shares. 80 Cal. 490.

In a suit to quiet title to property of deceased, the administrator and devisees may join as plaintiffs. 80 Cal. 259.

The probate court has jurisdiction on a petition for distribution to determine contested heirship. 81 Cal. 408.

On a petition for the revocation of letters of administration, jurisdiction to issue such letters will be presumed. 84 Cal. 107.

An order appointing an administrator upon a petition setting up the jurisdictional facts amounts to an adjudication of the existence of such facts. 84 Cal. 107.

The publication of an order to show cause may be made in any newspaper in the county. 84 Cal. 444.

An order directing a creditor to commence an action in the name of the administrator is invalid. 85 Cal. 545.

Publication must be for two weeks in cases of sales of real estate, but if the paper is weekly, it need not be made on the day of the sale. 84 Cal. 444.

Where an antenuptial will is offered for probate, the surviving wife need only show the subsequent marriage in order to defeat the probate. 87 Cal. 645.

V. PROBATE SALES.

▲ notice of sale of real estate must be made

for three weeks, but the number of times is in the discretion of the court. 73 Cal. 558.

An executor who sells property without an order of court is guilty of conversion, and liable for its value, with interest. 74 Cal. 536.

Order for public and private sales, when and how made. 75 Cal. 258.

A void probate sale will not be enforced against an estate at the instance of the administrator. 78 Cal. 597.

A probate sale is void unless the petition shows the condition of the land, and the decree the general facts showing it to be necessary. 78 Cal. 597.

The court has discretion to deny a creditor's petition for the sale of real property, where there has been unreasonable delay in the application. 85 Cal. 151.

A bill of sale to J. D., as administrator, etc., after he has resigned, is an individual transfer. 79 Cal. 268.

A contract by which the property of an estate is purchased for the executor is wholly void. 81 Cal. 507.

The jurisdiction of a probate sale depends on the averments of the petition; but mere technical exactness is not requisite. 82 Cal. 174.

Substantial compliance with section 1537 of the Code of Civil Procedure is sufficient to sustain an order for the sale of real property. 85 Cal. 151.

Whether findings are necessary upon probate order of sale not decided; but in the absence of any record to the contrary, such finding will be presumed waived. 85 Cal. 151.

A petition for probate sale may refer to the inventory for description. 82 Cal. 174.

A substantial compliance with law will defeat a collateral attack on a probate sale. 82 Cal. 548.

A sale by an executor, unauthorized by the probate court, is utterly invalid. A party who purchases at an unauthorized probate sale cannot set up the acquiescence of the heirs as an estoppel against them. 85 Cal. 390.

The validity of a probate sale depends on a substantial compliance with the law. 84 Cal. 444.

Where an executor neglects to apply for an order of sale of real estate, a creditor has the right to make such application. 87 Cal. 480.

VI. PLEADINGS AND CONSTRUCTIONS.

A petition for the probate of a will need not state the species of the will. 70 Cal. 140.

A mere defect of form in such petition cannot invalidate the probate. 70 Cal. 140.

A petition for letters of administration is a pleading. 71 Cal. 513. As such, the assertions therein are evidence against the petitioner, if signed by him or by an attorney with his authority. *Id.*

In a suit against an executor or adminis-

trator, an allegation that he is such sufficiently shows his character. 72 Cal. 544.

Objections to the probate of a will must be made in writing. 72 Cal. 131.

The failure of a proponent to file an answer to the opposition to the probate of a will is not an admission of the allegations of the opposition, when such opposition consists merely of denials. 73 Cal. 567.

In such cases the rule stated in 53 Cal. 141 prevails. 73 Cal. 567.

A great register is not evidence of age. 74 Cal. 183.

Agency ceases with the death of the principal. 75 Cal. 349.

A bequest of ornaments held to include personal jewelry. 75 Cal. 189.

A bequest to charitable corporations by an erroneous name held to be valid. 75 Cal. 329.

Where a person writes a testator's name to a will at her request, he need not witness her signature. 74 Cal. 353.

Undue influence by any person, whether interested or not, is ground for setting aside a will. 74 Cal. 52.

The purchase of the estate of a copartner does not create a new partnership. 76 Cal. 44.

The election of a widow to take under the law, and not under the will, is not a contest over the will. 77 Cal. 313.

The fact that such widow procures the will to be probated is not an estoppel against her. 77 Cal. 313.

A widow takes by will what her husband devises to her, in addition to her half of the community property. 77 Cal. 313.

Contestants against the probate of a will regular on its face must prove such facts as they allege. 77 Cal. 479.

In suit against administrator on account, section 454 of the Code of Civil Procedure governs. 77 Cal. 186.

Sufficiency of complaint against an administrator. 77 Cal. 187.

An order appointing a new administrator presumes that the account of the old one has been settled. 78 Cal. 581.

An executrix who becomes disqualified by marriage cannot nominate her successor. 78 Cal. 582.

The pendency of a proceeding to decide heirship, under section 1664 of the Code of Civil Procedure, is not cause to compel continuance of a petition for distribution; both may be heard simultaneously. 78 Cal. 109.

The doctrine of *cy-près* applied. 78 Cal. 141.

The provisions of section 1575 of the Civil Code as to "undue influence" apply to wills as well as to contracts. 79 Cal. 313.

The consent to appointment of a new administrator is equivalent to the acceptance of the resignation of the old one. 80 Cal. 8.

Probate courts have no jurisdiction to

adjudge partition between the estate and strangers. 80 Cal. 490.

Objections that the special administrator had not legal capacity to sue cannot be taken by demurrer. 80 Cal. 257.

A person who takes possession of the property of a decedent holds it in trust for the heirs and creditors. 80 Cal. 378.

In a will providing for the widow, but omitting the children, the children take as if the father died intestate. 81 Cal. 571.

A surviving partner may sue an administrator for an accounting and settlement without presenting any claim against the estate. 83 Cal. 436.

When a trust fund has been so mingled with the funds of a deceased trustee as to be incapable of being traced or identified, the only remedy of the beneficiary is that of a creditor; it is otherwise if the trust property can still be ear-marked, traced, and identified. 85 Cal. 436.

The provisions relating to guardian *ad litem* do not apply to probate proceedings; the attorneys appointed for minors are, in effect, their guardians *ad litem*. 75 Cal. 593.

The trustees appointed under a will are not aggrieved parties who have the right to appeal from an order allowing the attorney for the minor heirs a fee for his services, nor are they concerned as to who shall bear the costs of litigation between the parties in interest. 83 Cal. 420.

VII. STATUTE OF LIMITATIONS.

Action by heirs to recover property sold by an illegal administrator must be brought within three years after the sale. 63 Cal. 95.

The statute of limitation does not run against a claim after it is allowed and approved by the administrator. 68 Cal. 52.

The failure of a non-resident alien to claim an estate for five years bars his rights. 70 Cal. 155.

Action by the attorney-general to have the estate e-cheated within five years is premature. 70 Cal. 155.

An action to foreclose a mortgage on a homestead after the claim has been allowed is not affected by the statute of limitation. 72 Cal. 544.

After one year, the probate of a will cannot be contested, unless in cases of disability. 74 Cal. 384.

Proceedings for escheatment cannot be begun for five years after the death. 76 Cal. 294.

A decree of distribution may be set aside within six months for fraud, mistake, inadvertence, or surprise. 80 Cal. 144.

VIII. VACANCIES.

The insanity of an administrator does not render his office vacant *per se*. In such

cases, another administrator should be appointed, where the incumbent has been adjudged insane by a commission of lunacy. 68 Cal. 281.

After the issuance of letters testamentary, a special administrator cannot be appointed without a vacancy. 70 Cal. 343.

The marriage of an executrix does not of itself render her office vacant. 70 Cal. 345.

Where the probate of a will is revoked, the judgment should annul all probate proceedings. 73 Cal. 555.

In such cases the probate must be amended, not only as to the contestant, but to all parties in interest. 73 Cal. 555.

A person nominated as co-executor, but who neglects to qualify, has no authority. 73 Cal. 459.

There is no such office in California as executor *de son tort*. 73 Cal. 459.

When an executor renounces his right, letters of administration must issue under section 1365 of the Code of Civil Procedure. 74 Cal. 338.

When an executor renounces, the person who would be entitled to letters of administration but for the will succeeds him. 74 Cal. 338.

One who has an unsettled partnership account cannot be an administrator. 74 Cal. 333.

IX. SURVIVING PARTNERS.

Probate courts may require a person who admits being a surviving partner to file his account, but cannot settle the same, nor if the copartnership be disputed, determine it. Such matters will be determined in a suit in equity. 75 Cal. 463.

A surviving partner must settle the affairs of the partnership without delay, and account for and pay over such balances as may become due. 68 Cal. 396.

Probate courts have no jurisdiction to adjudge partition between the estate and strangers. 80 Cal. 490.

Cases in which a surviving partner may sue an administrator for an accounting. 85 Cal. 436.

The purchaser of the interest in copartnership property does not thereby become a copartner with the survivor. 76 Cal. 44.

An action for an accounting lies against a surviving partner, even before he has completed the liquidation of the partnership affairs. 75 Cal. 519.

A surviving partner cannot maintain an action against the personal representative of his deceased partner for an accounting. 70 Cal. 581.

A surviving partner has power to settle the business of the partnership, and do everything necessary to wind up its affairs, including the prosecution of suits for torts. 84 Cal. 89.

A surviving partner cannot collect a claim

from the general assets of his copartner without a settlement. 68 Cal. 395.

A claim against a surviving partner is not waived by failure to present it against the estate in time. 86 Cal. 434.

See PARTITION; PARTNERSHIP.

X. MANAGEMENT OF ESTATES.

An action may be brought by an administrator to subject land to administration. 68 Cal. 445.

A surviving partner must settle the affairs of the partnership without delay, and account for and pay over such balances as may become due. 68 Cal. 396.

An administrator is not entitled to an allowance for services to any one which he should have rendered himself, or caused by his neglect of duty, or by his unreasonable delay in settling the estate. 72 Cal. 343. See 74 Cal. 199.

In such case, evidence that the expense was necessitated by such delay is admissible. 72 Cal. 343.

An administrator is liable for property lost through his neglect, and for interest on the trust funds mingled with his own and omitted from his account. 73 Cal. 547.

An executor is only liable for a debt when he neglects its collection. 74 Cal. 199.

Partial distribution cannot be granted on the petition of the executor. 74 Cal. 311.

Probate courts may require a person who admits being a surviving partner to file his account, but cannot settle the same, nor, if the partnership be disputed, determine it. 75 Cal. 463.

The cost of a monument is payable as funeral expenses. 76 Cal. 589.

A special administrator cannot allow or pay claims against an estate; the order appointing him must specify his powers. 78 Cal. 301.

An administrator has no authority to carry on the business of the deceased; if he does so, it is at his own risk. 80 Cal. 166. Such business cannot be reported in his official account, but separately, if at all, and his conduct therein, if fraudulent, may be investigated in a civil suit. 80 Cal. 177.

XI. HOMESTEAD AND FAMILY ALLOWANCE.

A probate homestead may be set apart even on land disposed of by will. 69 Cal. 458.

An order approving the report of homestead appraisers is appealable within sixty days. 71 Cal. 300.

An action to foreclose a mortgage on a homestead after the claim has been allowed is not affected by the statute of limitation. 72 Cal. 544.

Probate homestead may be set apart without notice. 72 Cal. 591.

A homestead to the extent of five thousand dollars may be set apart to the widow,

although there are no minor children. 72 Cal. 593.

One who lives apart from her husband, by an agreement, surrendering all marital claims, is not entitled to a family allowance on his death. 73 Cal. 583.

In cases where there are no findings, they will be presumed to have been waived. 73 Cal. 591.

A homestead out of the separate property can only be set apart for a limited period, and property which could not be homesteaded during life cannot be homesteaded by the court. 73 Cal. 593. But see 81 Cal. 579.

A probate homestead set apart to a widow (there being no minor children) out of the community property becomes her absolute property forever. 74 Cal. 614.

A homestead cannot be set apart to the minor children not those of the deceased either in fact or by adoption. 75 Cal. 379.

Right of court to make family allowance, though ample provision for support is made in the will, affirmed. 77 Cal. 642.

Where the homestead is on the separate property of the survivor, the mortgage on it need not be presented as a claim, if all claim against the estate is waived. 77 Cal. 63.

All of the husband's interest in homestead property vests in his wife at his death. 76 Cal. 639.

Premises suitable for a homestead may be set apart to the widow, regardless of previous use for business. 78 Cal. 483.

Where no homestead has been selected, one may be set apart to the widow, even where there are no minor children. 72 Cal. 591; 80 Cal. 71. But it must be such as might have been selected during her husband's life. 73 Cal. 592; 80 Cal. 72; 80 Cal. 208. But see 81 Cal. 579.

An order setting apart a probate homestead relieves it from administration, but does not affect the title. 81 Cal. 240.

There is no provision for the payment of money in lieu of a homestead. 81 Cal. 580.

Where a homestead is mortgaged by husband and wife, and the husband dies, the mortgage cannot be foreclosed even as against the wife, unless the claim has been first duly presented to the administrator. 85 Cal. 55.

A homestead out of the separate property of decedent can only be set apart to the wife for a limited time, and certainly not longer than during her life. 85 Cal. 619.

A homestead acquired under the act of 1862 vests absolutely in the survivor on the death of either spouse. 87 Cal. 329.

A probate homestead set apart by the court, under sections 1465 and 1468 of the Code of Civil Procedure, is not limited to five thousand dollars in value. The matter of homestead allowance is within the discretion of the court, and unless such discretion is abused, the appellate court will not

interfere. The decisions in 72 Cal. 591, and 73 Cal. 590, held not binding, since the repeal of certain portions of the probate law. 81 Cal. 579. See 76 Cal. 639.

A mortgage on the homestead of a husband and wife must, on the death of the husband, be presented to the executor before a suit can be brought to foreclose. The presentation of the mortgage note without the mortgage is not sufficient. 86 Cal. 348. See also 86 Cal. 322.

A probate homestead may be selected from business premises. 78 Cal. 483.

Provisions of the law for the support of the decedent's widow should be liberally construed. 83 Cal. 322.

Provisions of the law for the support of the widow are conclusive, if not appealed from. 83 Cal. 322.

XII. APPEALS IN PROBATE CASES.

An order refusing to remove an administrator is not appealable. 68 Cal. 394.

An order denying a new trial in the contest of a will is appealable. 68 Cal. 132.

On appeal by a legatee from a decree of distribution, the three-hundred-dollar undertaking stays all proceedings. 69 Cal. 241.

An order refusing to revoke the probate of a will is not appealable. 70 Cal. 147.

A decree of distribution will not be set aside because posting of notices, etc., by the clerk was not proven. Official duty will be presumed to have been executed. 70 Cal. 147.

When the proceeds under a decree of distribution is accepted, it bars all appeal. 87 Cal. 203.

An order vacating a decree settling a final account is not directly appealable. 70 Cal. 604.

In probate matters, *certiorari* will not lie when there is an ample remedy by appeal, even when the time for appeal has expired. 71 Cal. 322.

An order approving the report of homestead appraisers is appealable within sixty days. 71 Cal. 300.

An erroneous instruction as to marriage, when the evidence shows that there was no marriage, is not ground for the reversal of judgment. 72 Cal. 107.

An appeal from an order settling a final account cannot be taken before the order is entered. 72 Cal. 577.

An order refusing an allowance for money improperly expended by the administrator will not be reversed. 73 Cal. 545. In such case a motion for a new trial is not proper. *Id.* See 72 Cal. 337.

Failure to open a default against heirs, in a contract to establish heirship, will not be reviewed on *certiorari*. 73 Cal. 295.

A person who is nominated as co-executor, and neglects to qualify, has no authority. 73 Cal. 459.

estate of mother

There is no such office as an executor *de bon tort*. 73 Cal. 459.

Findings will be presumed to be waived, unless the record shows otherwise. 74 Cal. 199.

Appeal from decree of distribution must be taken within sixty days. 83 Cal. 619.

An order settling the account of an administrator is appealable. The allowance of the court of a claim for services rendered to an executor is conclusive against all parties interested if no appeal is taken, except those laboring under disability. 87 Cal. 480.

An order refusing to vacate a decree of distribution is not appealable. 83 Cal. 619.

An order made authorizing an executor to mortgage real property is appealable. 74 Cal. 217.

An appeal from a decree of distribution must be taken within sixty days. 75 Cal. 523; 83 Cal. 619.

On an appeal from a distribution order by one not interested, the distribution order will be affirmed. 76 Cal. 497.

Attorneys appointed by the court are entitled to their fee for services rendered on appeal in supreme court. 78 Cal. 625.

Such fees are not part of the cost bill. 74 Cal. 533; 78 Cal. 627.

Such fees should be fixed and allowed by the superior court, even when the services are rendered in the supreme court. 71 Cal. 330; 78 Cal. 627.

An order declaring who is entitled to a legacy is not appealable. 78 Cal. 136. See Code Civ. Proc., sec. 1664.

An order settling the account of the administrator is not a final judgment. 83 Cal. 166.

Final order in special probate proceedings are not appealable, except under section 963 of the Code of Civil Procedure. 82 Cal. 161.

PROHIBITION.

Prohibition lies to prevent a superior court from setting aside a judgment affirmed on appeal. 68 Cal. 604.

Prohibition will not lie to prevent a superior court from setting aside an order discharging an administrator. 68 Cal. 398.

Prohibition lies to restrain a court from an excess of its jurisdiction, when there is no other plain, speedy, and adequate remedy. 69 Cal. 105.

Prohibition will not lie to the superior court to restrain an excess of jurisdiction, unless the attention of that court has been first called to it. 72 Cal. 572.

The writ of prohibition will lie to a superior or justice's court to prevent its trying a criminal action in which it had no jurisdiction. 78 Cal. 556; 82 Cal. 284.

Prohibition will not issue in a case where the trial court has jurisdiction. 80 Cal. 40.

Prohibition will not lie to prevent a justice's court trying a case of vagrancy without a jury. 82 Cal. 613.

A writ of prohibition will not lie to prevent a superior court from trying an action in an improper county. 83 Cal. 491.

A writ of prohibition will not lie where the court had jurisdiction, and there is a remedy by appeal. 84 Cal. 592.

Service on a party in interest; rules of supreme court construed. 84 Cal. 327.

Service of a party in interest may be made on his attorney. 84 Cal. 327.

Prohibition is a preventive rather than remedial remedy, and will not lie when the act sought to be prohibited has been completed. 84 Cal. 337.

Where the court is supervising an illegal receiver, prohibition will lie against the court, and indirectly, against such receiver. 84 Cal. 327.

Prohibition will lie when the ordinary remedy is not speedy or adequate. 84 Cal. 327.

A writ of prohibition will not issue in a criminal case, where the petitioner has a plain, speedy, and adequate remedy by appeal. 85 Cal. 49.

The title to property cannot be tried on a writ of prohibition, and when a court, by its order, takes possession of the property of a stranger who claims it as his own, the order is in excess of jurisdiction, irrespective of the actual state of the title. 84 Cal. 327.

Case in which the writ will not lie to prevent the hearing of an appeal from a justice's court. 84 Cal. 535.

See INSOLVENCY.

PROMISE.

See CONTRACT; PRESUMPTIONS; STATUTE OF FRAUDS.

PROMISSORY NOTE.

See NEGOTIABLE INSTRUMENTS.

PUBLICATION.

See INSOLVENCY; JURISDICTION; LIBEL; NOTICE; PROBATE LAW; SLANDER.

PUBLICATION OF SUMMONS.

See JURISDICTION; SUMMONS.

PUBLIC ADMINISTRATOR.

See PROBATE LAW.

PUBLIC HIGHWAY.

See HIGHWAY.

PUBLIC LANDS.

Nature of the ownership of the United States. 69 Cal. 255.

Authority of the United States over Indian lands. 68 Cal. 593.

Agreement of pre-emptioner, when void. 68 Cal. 593; 70 Cal. 597.

Certificate relates back to date of settlement. 68 Cal. 39.

A superior judge cannot be compelled by *mandamus* to issue subpoenas for witnesses to appear before the United States land-office. 72 Cal. 280.

Conclusiveness of land-office decision as to priority or other facts. 70 Cal. 544; 70 Cal. 276.

Title obtained by fraud makes the holder a trustee. 70 Cal. 544.

Patents cannot be collaterally attacked for perjury. 75 Cal. 597.

Forcible entry on another's possession can give no title under the homestead laws. 81 Cal. 136; 68 Cal. 26. But see 78 Cal. 396; 83 Cal. 167.

A woman who pre-empts and marries, and afterwards pays for the land out of community funds, acquires the land as her separate property. 71 Cal. 314.

A soldier's homestead may be located by his attorney in fact, and assigned before patent to any one. 73 Cal. 385.

The regulations of the commissioner of the general land-office, when not repugnant to the laws of Congress, have the force of law. 73 Cal. 388.

A patent not void on its face is *prima facie* valid. In order to attack such a patent, the party must show that the land was not of such character as could be patented under any law of the United States. 75 Cal. 293.

A patent to land, issued by the United States upon a confirmed Mexican grant, is conclusive upon the government and all claiming under it after its date, nor can there be any homestead entry on the same. 85 Cal. 313.

The boundary lines of land which have gone into the patent are conclusive between the holder and the government. 85 Cal. 313.

The pueblo of San Francisco derives its title from the government of Mexico, and not from the United States, whose patent is a mere confirmation of such title. 85 Cal. 448.

The courts have the right, even in actions of ejectment, to inquire whether a patent includes land which the government had power to convey. 85 Cal. 448.

The decree of confirmation of the pueblo lands of San Francisco must control the survey and patent subsequently made. 85 Cal. 448.

Lands below ordinary high-water mark were not part of the pueblo lands of San Francisco, but passed to the state of California in the admission to the Union. 85 Cal. 488.

The title to pueblo lands under Mexican law was never in the nature of a private land grant, but invested the use of the land in the pueblo in trust for the benefit of settlers. (The case of *People v. San Francisco*, 75 Cal. 389, overruled in part.) 85 Cal. 448.

Where a patent has been obtained by fraud of the defendants and the mistake and misconception of the land department, equity will decree a trust in favor of the true owners. 86 Cal. 596.

Naked possession of the public domain will not place a person in a position to attack or control a patent issued to another. 86 Cal. 596.

Congress can withdraw public land from sale or pre-emption before the same is paid for. 86 Cal. 279.

In a contest with the railroad company, it is not admissible to show possession of land by the predecessors of a defendant prior to the railroad grant, and that they were qualified pre-emptioners, if it appears that none of them procured title to the land before it was granted to the railroad company. 86 Cal. 279.

When a pre-emptor pays for the land, and takes a receiver's receipt, he thereby becomes the equitable owner, and the government cannot afterwards sell it to another, or hold it open to pre-emption. A subsequent filing on such land by another confers no title whatever. 84 Cal. 499.

Ejectment may be maintained on a receiver's receipt, the same being, in effect, a certificate of purchase. 84 Cal. 499.

The conveyance of the land pre-empted, and the delivery of the certificate, are sufficient evidence of the assignment of the certificate, and all rights thereunder. 84 Cal. 499.

A party who rescinds a contract in order to qualify as a witness before the United States officers cannot afterwards have it renewed. 75 Cal. 342.

A *bona fide* purchaser of public land cannot be held to be the trustee for a stranger. 76 Cal. 555.

Errors of the land department on questions of law may be reviewed by the courts, but it is otherwise as to questions of fact. 87 Cal. 371; 76 Cal. 555.

An act of Congress held to operate as a grant *in presenti*. 76 Cal. 499.

A railroad patent to a tract, containing a reservation of "all mineral lands, should any be found therein," does not pass the title of the government to any portion thereof that is mineral land. 75 Cal. 195. (Searls, C. J., and McFarland, J., dissenting.)

A patent is conclusive as to the character of the land, where it contains no reservations. 78 Cal. 235.

Possession of public lands is a question of fact. 76 Cal. 251.

Possession of a part of an inclosed tract, under a deed for the whole, is possession of the whole. Such possession may be by an agent or tenant. 78 Cal. 251.

A railroad patent to land included in a valid Mexican grant is void *ab initio*. 77 Cal. 158.

A pre-emptor has such privity with the United States that he may attack a void patent. 77 Cal. 158.

Possession of a trespasser on public land cannot prevent a valid homestead entry thereon. 78 Cal. 396. See also 83 Cal. 167.

A receiver's receipt is *prima facie* evidence of a valid homestead entry, and of the homesteader's title to the land, and is sufficient to maintain ejectment. 78 Cal. 296.

Under the town-site law, if the occupant is an unmarried woman, the fact that afterwards her husband advances the funds to purchase it does not make it community property. 80 Cal. 317.

Land inclosed by a dilapidated fence is not so possessed as to preclude entry by a homesteader. 80 Cal. 590.

The law forbidding the cutting of timber on government land does not apply to chaparral and scrub-oak removed for the purpose of cultivation. 81 Cal. 60.

A possessory right to public lands may be the proper subject of sale. 81 Cal. 60.

A patent is at least *prima facie* evidence that all preliminary conditions have been fulfilled. 77 Cal. 69. See 78 Cal. 235.

One who has procured a desert-land entry to be canceled does not acquire any priority of entry for himself. Such priority only applies to pre-emption, homestead, and timber-culture entries. 83 Cal. 33.

The title of the city and county of San Francisco to the pueblo lands was in nature of a trust for the benefit of the inhabitants, and to devote the residue to public use; its right of disposition and use was in all particulars subject to the control of the government. 87 Cal. 329.

The grant of Congress to the city of San Francisco of pueblo lands was intended to be made in trust for the head of a family residing on the lands, and inured to the benefit of a surviving wife in possession thereof at the date of its passage. 87 Cal. 329.

A homestead acquired under the act of

1862 vested absolutely in the survivor, and need not be set apart by the probate court. 87 Cal. 329.

A presumption attaches to a grant of land by the ayuntamiento of a pueblo to a private person who has been put in possession by the alcalde, that the authorities acted within the limits of their authority in making the grant. 87 Cal. 514.

To show a dedication of public land as a plaza without a conveyance, and merely by way of gift or abandonment, the intent of the owner must be clearly proven by his express declarations, admissions, or acts. 87 Cal. 514.

A patent from the United States under the act of Congress of July 23, 1866, to quiet land titles in California, cannot be impeached by evidence that the land was swamp and overflowed. 87 Cal. 371.

Swamp-lands lying within the exterior boundaries of a Mexican grant were not included in the grant of swamp-lands to the state of California. 87 Cal. 371.

A decision of the land department of the United States, upon a question of fact coming before it on a contest, is conclusive upon the party, in the absence of fraudulent imposition, and on this ground the patent can only be assailed in a proceeding in equity. 87 Cal. 371.

The decision of the land department as to the character of land is conclusive when distinctly adjudged. 87 Cal. 371.

The land department of the United States cannot grant land. It has no power to award one person land which Congress has granted to another, and its decision so awarding is a nullity. 87 Cal. 371.

The delay of a swamp-land claimant under certificate of purchase issued in 1856, to take steps to have the character of the land determined, is presumptive evidence that the land was never swamp and overflowed. 87 Cal. 371.

A certificate of tide-land issued prior to the "curative" act of 1872 was validated by that act. 87 Cal. 23.

Evidence that a party who was in possession of public lands at the time the railroad grant took effect was a qualified pre-emptor, but had applied to enter the land, and had been refused, is not proof, without an offer to pay the register's fees, that the land was exempted from such grant. 77 Cal. 69.

Mere occupancy of public land gives no right against a subsequent congressional grant. 77 Cal. 327.

Only one in privity with the government title can attack a patent to the state, of lieu lands. 77 Cal. 257. But see 83 Cal. 101.

An innocent purchaser of lieu lands improperly selected has a preferred right to purchase the same from the United States. 77 Cal. 257.

A patent to an administrator vests the legal title in him. 77 Cal. 257.

See **CERTIFICATE; MANDAMUS; MINING CLAIMS.**

STATE LANDS.

Temporary absence from a claim is not abandonment. 79 Cal. 1.

The state can obtain no title to school-lands until fully surveyed. 81 Cal. 590.

The certificate of the state surveyor-general is presumed to be correct. 82 Cal. 513; 82 Cal. 570.

An applicant must prove his citizenship. If foreign-born, his non-citizenship will be presumed until the contrary is shown by record evidence; but parol evidence or the great register is not sufficient. 82 Cal. 570; 82 Cal. 647; 82 Cal. 513; 82 Cal. 104.

Certificate of purchase, how impeached. 82 Cal. 104.

Each party in a contest over state land must prove his citizenship, whether it be denied or not. 82 Cal. 570.

Applicant for state land must be an actual settler thereon. 72 Cal. 236; 71 Cal. 318; 68 Cal. 506; 82 Cal. 104.

Contest may be had after the issuance of certificate. 68 Cal. 539.

Essentials of affidavit of applicant. 72 Cal. 29; 71 Cal. 318; 68 Cal. 539.

Action to determine contest over. 70 Cal. 247; 68 Cal. 267; 68 Cal. 539.

Fitness for cultivation a question of fact. 68 Cal. 267.

Title of state to lieu land cannot be attacked by a stranger. 68 Cal. 184. But see 82 Cal. 104.

Contest between pre-emptor and state as to pre-emption. 68 Cal. 184.

Contest over university land. 68 Cal. 473.

Reference to court for adjudication. 68 Cal. 539; 70 Cal. 247.

Services of summons by publication, in contests over. 70 Cal. 150.

Sale of over 160 acres school-land to one person void. 70 Cal. 430.

Action to set aside patent to, essential allegations. 70 Cal. 276.

Essentials of complaint and answer in contest over. 71 Cal. 209.

Adverse occupancy defined. 71 Cal. 209; 72 Cal. 29; 71 Cal. 318.

A certificate of lieu lands from the general land-office of the United States conveys the title as effectually as a patent. Such title will prevail over the patent to a pre-emptor who settled on the land subsequent to the state's selection, though prior to the listing of the land to the state. 83 Cal. 539.

The commissioner of the general land-office cannot cancel the state's selection of lieu lands and the listing thereof to the state, in favor of a pre-emptor who had no prior rights. 83 Cal. 539.

A listment of land to the state, under the

Booth act, cannot be canceled by the Secretary of the Interior, and a patent dependent on such cancellations is void, and may be collaterally attacked in an action of ejectment, even by a mere squatter. 83 Cal. 101.

An application to purchase state lieu land, which contains no description by legal subdivisions, is void, and a certificate of purchase thereunder conveys no title. 83 Cal. 101.

A deed to school-lands before certificate of purchase is issued, or any payment made thereon, conveys no interest in the land. 84 Cal. 611.

A deed grant to school-lands, void for want of any interest in the land conveyed, does not bind the title afterwards acquired from the state by the grantor. 84 Cal. 611.

Certificates of purchase as presumptive of title. 71 Cal. 21.

Title under certificate inures to the grantee. 71 Cal. 21.

"Lands suitable for cultivation" defined. 72 Cal. 236.

Plaintiff in a contest over state land must recover on the strength of his own title. 72 Cal. 236.

Limitations as to time within which to begin suit does not extend against a subsequent application. 76 Cal. 499.

In ejectment, a certificate of purchase may be attacked by proof that the applicants' petition therefor was false in any material particular. 82 Cal. 104.

See **DEEDS; STATUTE OF LIMITATIONS.**

PUBLIC OFFICERS.

The summary proceedings mentioned in section 772 of the Political Code relate to the removal of officers. 68 Cal. 324.

The County Government Act of 1883 did not repeal the acts of 1861 or 1870, or section 3428 of the Political Code, relating to commissions or mileage for collecting taxes. But such fees are to be paid into the county treasury. 68 Cal. 54.

Redwood City marshal's salary and bond, construed. 68 Cal. 515; 68 Cal. 512.

Petition for mandate to compel fire commissioners to admit petitioner to a seat held insufficient. 69 Cal. 460.

Circumstances under which a right to a public office may be tried by *mandamus*. 69 Cal. 460.

Disposal of fees received by the recorder of San Luis Obispo County. 69 Cal. 531.

A public officer is not liable for any matter wherein he is allowed discretion. 83 Cal. 447. See 71 Cal. 205.

Section 770 of the Penal Code, as to the removal of a public officer, construed. 83 Cal. 46.

Limitation as to the power of the gov-

error to remove pilot commissioners. 76 Cal. 633; 83 Cal. 453.

The decision of the supervisors of San Francisco is final as to the legality of demand on the treasurer, and *mandamus* will lie to compel the auditor to audit and allow the same. 84 Cal. 544.

Disposition of fees of immigration commissioner. 70 Cal. 212.

An agreement to compensate a deputy sheriff for procuring evidence to convict for a crime committed in another county is not contrary to public policy. 70 Cal. 502.

Mandamus will not lie to compel the supervisors to appoint a particular person road overseer. 70 Cal. 612.

Where an officer is vested with discretion, he is not subject to the control of the courts in the use thereof. 71 Cal. 205.

A finding that a superior judge's resignation was not procured through fraud, or an offer to divide the salary, held supported by evidence. 71 Cal. 618.

A county tax collector cannot maintain suit against the county on a *quantum meruit* for services performed in collecting license taxes. 72 Cal. 353.

Subsequent acts of the legislature prohibiting the same offenses, but imposing different penalties or giving different remedies, repeal so far such former acts. 75 Cal. 153.

A federal official cannot hold a state office. 73 Cal. 230.

A superior court has jurisdiction to try the question of usurpation of the office of police judge. 73 Cal. 486.

"The one-twelfth act" held not to apply to the salaries of statutory officers. 74 Cal. 413.

District attorney of Fresno County held not entitled to certain fees. 74 Cal. 475.

The act of 1874 for the removal of officers for malfeasance held to be invalid. 75 Cal. 147.

Bonds of indemnity executed to the sheriff belong to him personally. 76 Cal. 246.

Pilot commissioner appointed by the governor with consent of senate can only be removed by the concurrence of both. 76 Cal. 633.

Liability of immigration commissioners for fees, statute of limitations as to. 76 Cal. 121.

The office of sheriff and tax collector require separate bonds. 76 Cal. 606.

Certificates as evidence of the time of default. 76 Cal. 1.

San Francisco gas inspector's salary held due monthly, and forfeited if not presented for allowance in time limited by section 90 of the consolidation act. 76 Cal. 325.

Fees of recorder of San Louis Obispo County. 76 Cal. 92.

Fees of tax collector of Monterey County. 76 Cal. 113.

A person acting as a public officer is pre-

sumed to have been regularly appointed and has performed his official duty. 77 Cal. 46.

Pleading in actions on official bonds. 77 Cal. 45.

Fees allowed sheriff for transporting prisoners to state prison must be paid into county treasury. The sheriff has no right to retain them. 77 Cal. 592.

A municipal corporation is not liable for the negligence of its officers. 78 Cal. 588.

Statute making the term of the board of health five years is unconstitutional. 79 Cal. 105.

Failure to file bond in time with county clerk and secretary of state held not of itself creative of a vacancy. 79 Cal. 105.

Jurisdiction of harbor commissioners over navigable waters. 79 Cal. 540.

The power of appointment to office is not essentially an executive function, within the meaning of the constitution; and where not required by the constitution, may be regulated by legislation. 80 Cal. 233.

The provisions of section 907 of the Political Code describing the time within which the oath of office must be taken are mandatory, and the official oath or bond must be filed within the prescribed time, or the right to the office becomes forfeited. 85 Cal. 509.

That portion of the section requiring an officer to qualify within fifteen days from the commencement of his term, "when notice has been given," applies to cases where his election or appointment is presumed to be known to him. 85 Cal. 509.

A person who did not receive his commission, or did not have knowledge of his appointment, has ten days after the receipt of his commission in which to qualify. 85 Cal. 509.

A slight difference between the designation of the office in the commission and in the official oath is of no importance. 85 Cal. 509.

When an election is to be held to fill a vacancy in the term of a superior judge, and such term expires on the next first day of January, the people will also be required at the same election to elect a judge for the new term. 86 Cal. 27.

Under the act of March, 1878, the board of election commissioners in San Francisco have no power to put a fourth person on the board of precinct registration. 86 Cal. 64.

The act of March, 1880, relative to the appointment of additional policemen in the city of Sacramento, is a special act, and unconstitutional. 85 Cal. 408.

The power to create officers not created by the constitution is a legislative power, and cannot be delegated. 85 Cal. 408.

A justice of the peace has power to dismiss or refuse to dismiss a criminal action without regard to the order of the district attorney. 85 Cal. 585.

To remove a judicial officer for misconduct, it must be charged to have been done in the discharge of judicial functions, and with corrupt, partial, malicious, and other improper motives, and with a knowledge that it was wrong. 85 Cal. 585.

Section 772 of the Penal Code, providing for the summary removal of officers, contemplates proceedings founded on the written accusation of a private person, not brought in the name of the people. 85 Cal. 639.

The summary proceedings for the trial of officers, under section 772 of the Penal Code, excludes the right of a trial by jury. 85 Cal. 639.

An accusation against a tax collector to remove him from office held sufficient. 85 Cal. 639.

Express trusts may be regulated by law, and if the law so directs, by the legislature. 80 Cal. 233.

Power of legislature to elect trustees of state library affirmed. 80 Cal. 233.

Provision of County Government Act forbidding increase of salaries during subsisting incumbency. 81 Cal. 588.

Authority of harbor commissioners to appoint and remove wharfingers and collectors. 81 Cal. 19.

A constable may execute a justice's warrant, properly indorsed, outside his county. 82 Cal. 187.

A constable who makes arrests outside of his county is entitled to his fees for taking his prisoner before the magistrate, and for going to make the arrest. 82 Cal. 187.

A constable is liable for the negligent care of goods held under attachment. 82 Cal. 604.

An appointment by the governor during a recess of the legislature, for a term of four years, operates merely as an appointment during such recess, and until the adjournment of its next session. 87 Cal. 475.

The law requiring every officer to discharge his duties until his successor has qualified applies to officers appointed temporarily by the governor to fill a vacancy. 87 Cal. 475.

Where the executive appoints with the consent of the senate, the issuance of a commission is part of the appointment. 87 Cal. 475.

An appointee need not qualify until he has received his commission. 87 Cal. 475.

A San Francisco police-officer has no vested right to the insurance fund, except from the happening of the contingencies mentioned in the insurance fund act. 87 Cal. 512.

The provision of the constitution forbidding the increase of compensation of a public officer does not forbid an allowance to the county superintendent for his traveling expenses and other incidentals connected with his office. 87 Cal. 394.

See APPROPRIATION; CONTROLLER; COUNTIES; CRIMINAL LAW; JUSTICES' COURTS; MANDAMUS; TAXATION; SHERIFF; SURETY; SUPERVISORS; MUNICIPAL CORPORATIONS.

PUBLIC ROADS.

See COUNTIES; DEDICATION; EASEMENTS; HIGHWAYS.

PUBLIC SQUARE.

See DEDICATION; MUNICIPAL CORPORATIONS.

PUBLIC USE.

See DEDICATION; EASEMENT.

PUNISHMENT.

See CRIMINAL LAW; HABEAS CORPUS.

PURCHASE PRICE.

See DEED; SPECIFIC PERFORMANCE; VENDOR AND VENDEE.

QUANTUM MERUIT.

See CONTRACTS; EMPLOYER AND EMPLOYEE; MECHANIC'S LIEN.

QUIET ENJOYMENT.

See DEED; LANDLORD AND TENANT.

QUIETING TITLE.

Action to quiet title setting up fraudulent acquisition must specify the acts of fraud. 70 Cal. 276.

Service of summons under section 474 of the Code of Civil Procedure, under a fictitious name, will not be quashed on the ground that plaintiff might readily have ascertained the true name. 70 Cal. 23.

A judgment against a plaintiff in a suit of ejectment is no bar to a subsequent suit brought by him to quiet title under an equitable cause of action. 71 Cal. 185.

It is the great object of courts of equity to put an end to litigation and to settle, if possible, in a single suit, the rights of all persons affected. 71 Cal. 187.

In an action to quiet title, a trustee holding the legal title is a proper party. 71 Cal. 187. See 84 Cal. 126.

An action to quiet title on the ground of a fraudulent appropriation of public land held barred by the statute of limitation. 71 Cal. 124.

A complaint to quiet title to a mining claim, which does not show it brought under section 2326 of the Revised Statutes of the United States, need not aver the plaintiff's citizenship. 72 Cal. 528. It is otherwise if brought under said section. 68 Cal. 43.

Testimony of a witness, since deceased, in an action of unlawful detainer between the same parties, is admissible in a suit to quiet title under subdivision 3, section 1870, of the Code of Civil Procedure. 73 Cal. 604.

The action to quiet title lies against any one claiming adversely to plaintiff, whether such defendant be in possession or not. 74 Cal. 493.

Section 738 of the Code of Civil Procedure provides that the issue which might have been the subject of an action in ejectment may be tried under this section. If in such an action the plaintiff avers a legal title against a defendant in possession, the latter is perhaps entitled to a jury trial on such issue. 74 Cal. 497.

In a suit to quiet title, it is not necessary to allege in the complaint the nature of the estate, or the interest claimed by defendant, whether legal or equitable. 74 Cal. 498.

The section authorizing an action to quiet title is very broad. An omission to find on the issue of defendants being in possession, is immaterial. 74 Cal. 499.

The continued assertion of an adverse claim constitutes, from day to day, a new cause of action. 74 Cal. 500.

A judgment in a suit to quiet title to an individual interest in land held sufficient. 74 Cal. 85.

Any interest or title may be the basis of a suit to quiet title. 74 Cal. 616; 86 Cal. 556.

Findings outside the issues should be disregarded. 79 Cal. 55.

A party having only a probate homestead interest in the property may maintain an action to quiet title. 74 Cal. 616.

A title once completely acquired by adverse possession is not affected by a subsequent offer of the adverse possessor to buy the paper title. 75 Cal. 337.

Action to quiet title to land alleged to be mineral, but patented to the Central Pacific Railroad Company. 75 Cal. 194.

Action to quiet title by mortgagor against mortgagee in possession. 75 Cal. 271.

Under the act of 1850, the city and county of San Francisco could be made a party in an action to quiet title. 76 Cal. 18.

A water-pipe for running a quartz-mill is appurtenant to the realty, and may be the subject of a suit to quiet title. 77 Cal. 399.

The existence of concurrent remedies at law for trespass, and in equity for an injunction, is not exclusive of the right to sue to quiet title. 77 Cal. 399.

An action to quiet title cannot be sustained by the owner of a mere equitable interest as against the holder of the legal title. 77 Cal. 295. But see 81 Cal. 120.

A finding that the plaintiff has no title, legal or equitable, renders a finding upon the issues of the statute of limitation, set up by the defense, immaterial. 77 Cal. 327.

In a suit to quiet title, the fact that the execution sale was irregular, in not selling certain lots separately, is not available as an attack on defendant's title acquired under such execution. 77 Cal. 121.

In an action to quiet title, an averment, by implication, that defendant's claim is invalid, is sufficient. 77 Cal. 192.

In an action to quiet title, an issue as to the possession of the plaintiff at the commencement of the suit is immaterial. 78 Cal. 144.

Where there is no plea of five years' adverse possession, issues as to the payment of taxes and adverse possession are immaterial. 78 Cal. 144.

In an action to quiet title, a judgment quieting title and canceling an invalid mortgage held to be proper. 78 Cal. 273.

On appeal from a judgment quieting title, a judgment for intervenor, not prejudicial to the appellant, will not be considered. 78 Cal. 144.

A complaint to quiet title, made in the usual form, is sufficient, and not vitiated by unnecessary allegations as to the nature of defendant's claim. 79 Cal. 443.

If a defendant makes no claim, he will be liable for costs, unless he files a disclaimer. 79 Cal. 443.

The distinction between an action to quiet title and a suit to remove a cloud upon title, pointed out. 79 Cal. 443.

Where the defendant holds the legal title, even through a mistake of description in a deed, the action to quiet title cannot be maintained against him. 79 Cal. 443.

An action to quiet title in regard to a water right acquired by appropriation. 79 Cal. 568.

When the complaint, without alleging "ownership," avers facts showing ownership, it will support a judgment for plaintiff. 79 Cal. 267.

When the answer claims no interest in the property, it is not necessary to find that the defendant had no interest. 79 Cal. 267.

The owner of a legal title to land has a right to maintain the action against the claimant of an invalid lien on such property. 79 Cal. 297.

In an action to quiet title, a mortgagee under defendant is not a necessary party. 79 Cal. 55.

A contract of plaintiff to convey to a third party will not preclude them from the right to an action to quiet title. 79 Cal. 55.

In an action to quiet title, the defendants cannot defend under a contract of tenancy from plaintiffs, unless such tenancy is pleaded in the answer. 79 Cal. 55.

In a suit to quiet title to the property of a decedent, the administrator, a devisee, and the heirs of a deceased devisee may unite as plaintiffs. 80 Cal. 257.

In a suit to quiet title, it is not necessary to prove adverse possession by defendants, or that the plaintiffs were in possession. 80 Cal. 257.

In a suit to quiet title, a description of the property sufficient for identification is sufficient. 80 Cal. 257.

In a suit to quiet title, where the defendant relies upon a title in himself, a cross-complaint is unnecessary, and may be stricken out. 80 Cal. 257.

See CROSS-PLEADINGS, under PLEADINGS.

A deed which appears to have been altered in a material respect after execution, is not admissible in evidence to show title. 80 Cal. 257.

In a suit to quiet title, leave to file a supplemental answer may be granted on condition of paying twenty dollars costs. 80 Cal. 74.

A finding on the issue of ownership is a finding of fact, and the evidence going to prove such ownership should not be pleaded. 80 Cal. 367.

When a finding is made as to ownership and right of possession, a failure to find on other issues is immaterial. 80 Cal. 367.

Where the defense of the statute of limitation does not appear on the face of the complaint, it can only be reached by answer. 80 Cal. 462.

A mortgagor of land under a deed absolute in form, after the debt has been outlawed, can only have his title quieted by paying up. 80 Cal. 132.

A mortgagee in possession must account for the rents and profits, and credit the same on the mortgage debt. 80 Cal. 132.

A right of way for a toll-road may be subject of an action to quiet title. 80 Cal. 338.

An administrator may bring an action to quiet title. 81 Cal. 127.

A simple right to possession is sufficient for the foundation of an action to quiet title. 81 Cal. 127.

A complaint may be considered as intended to quiet title to land erroneously included in a deed. 81 Cal. 120.

A right to quiet title to land erroneously included in a deed cannot outlaw while the grantor remains in possession. 81 Cal. 120.

The rights of the parties in several separate tracts of land may be adjudicated in the same action, where the adverse claimants are the same. 81 Cal. 127.

An answer in an action to quiet title held insufficient. 81 Cal. 127.

In a suit to quiet title, where the complaint sets forth the facts showing ownership, and then alleges ownership, the allegation of ownership will be treated as a mere conclusion. In such cases, the pleadings will be construed most strongly against the pleader. 82 Cal. 7.

Adverse possession for the requisite time and character confers title on which a suit to quiet title may be maintained, even as against a homestead. 82 Cal. 72.

Civil Code, section 1573, as to limitation, held to apply to action by heirs to quiet title. 82 Cal. 174.

In an action to quiet title to a mining claim, an answer that merely claims the right to follow a vein having its apex outside, beneath the surface of the land described in the complaint, raises no material issue. 88 Cal. 589; 83 Cal. 613.

The only effect of a disclaimer is to entitle the plaintiff to judgment without costs. 88 Cal. 589; 83 Cal. 613.

There is seldom occasion for a cross-complaint in an action to quiet title. 83 Cal. 589. The only material issue tendered by a complaint in such action relates to the real property described in the complaint. The averment of an adverse claim affects only the question of costs. 83 Cal. 589; 83 Cal. 613.

Where a defendant in an action on a mining claim answers that he only claims the right to follow his vein on its dips and angles under the land described in the complaint, the judgment should be for plaintiff as on a disclaimer, and saving the rights of the defendant as claimed by him. 83 Cal. 589; 83 Cal. 613.

It is not improper for the plaintiff to describe the nature of defendant's claim. 81 Cal. 127.

A party cannot now rely on naked possession of public land against a person claiming under the government, nor can he maintain an action against one who has filed a valid homestead claim on the premises. 83 Cal. 167.

Essentials of a complaint in an action to quiet title. 79 Cal. 569; 79 Cal. 443.

In an action to quiet title, the plaintiff cannot show, in rebuttal of the defendant's claim to a United States homestead entry, that a stranger has a prior pre-emption filing on the premises. 83 Cal. 167.

The court, in a decree of quieting title, may award the possession of the premises to defendant. 83 Cal. 167.

A nonsuit should not be granted for failure of plaintiff to prove an adverse title, claim, or interest in defendant, where there is no issue on this point. 84 Cal. 560.

Error in refusing a nonsuit may be cured by the subsequent evidence of defendant. 84 Cal. 560.

A judgment quieting title cannot be sustained under an ordinary complaint, where it appears that the defendant holds the property in trust for the plaintiff. 83 Cal. 39; 84 Cal. 126; 84 Cal. 45d.

Evidence tending to show that plaintiff holds title by virtue of a patent confirming a Mex can grant makes out a *prima facie* case in his favor. 84 Cal. 193.

A complaint to quiet title, counting upon title alone, is not supported by evidence of mere prior possession. The defendant in possession may show an outstanding title in a stranger. 85 Cal. 622.

An action to determine an adverse claim may be maintained, even though it depends on proceedings void on their face. 86 Cal. 556.

A judgment in an action to quiet title is not void because a summons was served by publication. 86 Cal. 580.

A decree quieting title partakes of a judgment *in rem*. 86 Cal. 580.

In an action to quiet title, the burden of proof rests on the plaintiff to show title in himself; otherwise he cannot recover. 87 Cal. 253.

A cross-complaint is proper, in an action to quiet title, when it seeks to enforce an equitable title against the plaintiff, or the holder of the legal title, but the facts in such cross-complaint must be stated as fully as they should be in a bill in equity. 87 Cal. 256.

A plaintiff who alleges title in himself cannot recover by merely showing a lien on the property. 87 Cal. 256.

The defendant may, by his cross-complaint, bring in whatever additional parties are necessary to the determination of the controversy. 87 Cal. 256. See 69 Cal. 621.

Where part payment is made on land, with the privilege of receiving it back if the title should not prove satisfactory, such money must be repaid before the vendor is entitled to a judgment quieting his title against the purchaser. 87 Cal. 443.

An action to quiet title is a suit in equity, and relief therein is subject to the maxim "that he who seeks equity must do equity." 87 Cal. 443.

See PLEADINGS—CROSS-PLEADINGS.

QUO WARRANTO.

In an action to enforce a corporate franchise for misuser or non-user, the legal existence of the corporation must be alleged. 77 Cal. 360.

The state held not estopped by a prior action. 73 Cal. 360.

The supreme court has appellate jurisdiction, in actions in the nature of *quo warranto*. 79 Cal. 105.

In an action of *quo warranto* to test the validity of a charter, the municipality is a necessary party defendant. 85 Cal. 238.

Action brought by the attorney-general, to oust a person from the office of supervisor, held to be in the nature of *quo warranto* and not limited by the statutes making the board of supervisors the judge of the election returns. 82 Cal. 238.

Quo warranto proceedings under the present constitution. 84 Cal. 114.

See CONSTITUTIONAL LAW; CORPORATIONS; JURISDICTION; MUNICIPAL CORPORATIONS; PUBLIC OFFICERS.

RAILROADS.

In action to recover delinquent taxes under section 3670 of the Political Code, the judgment ought not to include interest at the rate of two per cent per month. 68 Cal. 551.

The street-railroad corporation cannot acquire a right of way over a street without compensation to the owner of the fee. 69 Cal. 202.

Writ of review against supervisors in granting use of public highways for street railroad. 71 Cal. 236.

The compensation to be awarded the owner of land for a right of way to a corporation must be irrespective of any benefits that would accrue from the building of the road. 74 Cal. 261; 83 Cal. 556.

Interest due from state on Central Pacific railroad bonds. 76 Cal. 26.

Substitution of party plaintiff in a suit to condemn right of way. 76 Cal. 404.

In a suit to condemn a right of way, the complaint must particularly describe each piece of land sought to be taken. 76 Cal. 404.

A railroad in Golden Gate Park, operated so as not to obstruct the free and comfortable use thereof by the public, held not to be a nuisance. 76 Cal. 156.

A supervisors' ordinance imposing a license on the Southern Pacific Railroad Company for carrying is void as a tax upon a franchise granted by the United States. 77 Cal. 518.

Adverse possession of a railroad bed during the period required by the statute of limitation, together with the payment of all taxes thereon for such period, held to constitute a valid title. 77 Cal. 300.

A deed excepting and reserving a certain strip of land for a railroad construed. 78 Cal. 258.

The right of eminent domain may be exercised by a copartnership as well as by a corporation. 79 Cal. 159.

The authority of the railroad commissioners extends to all persons engaged in the business of transportation. 79 Cal. 159.

A railroad patent over a Mexican grant is invalid. 79 Cal. 130.

Where a railroad company erects improvements on the land before suit, such improvements must not be taken into consideration in estimating the value of the land. 84 Cal. 435; 85 Cal. 246.

A *bona fide* offer is admissible as tending to prove the value of the land. 83 Cal. 240.

The basis for fixing the value of the land is its worth when the summons issued. 83 Cal. 568.

The burden of proving the value of the land sought to be condemned is on defendant. 83 Cal. 507.

The value of the land sought to be condemned is its value for any purpose, even in connection with plaintiff's property. 78 Cal. 63.

The dedication of a street for public use authorizes its use for a street-railroad, without compensation to the owner of the fee. 87 Cal. 597.

See COMMON CARRIER; CONDEMNATION OF LAND; CORPORATIONS; DAMAGES; DEDICATION; EMPLOYER AND EMPLOYEE; GUARDIAN AND WARD; MINING CLAIMS; NEGLIGENCE; PUBLIC LANDS; TAXATION.

RAILROAD GRANT.

See MEXICAN GRANT; MINING CLAIMS; PUBLIC LANDS.

RAPE.

See CRIMINAL LAW.

RATIFICATION.

See ACQUIESCENCE; AGENCY; CONTRACTS; ESTOPPEL.

REASONABLE DOUBT.

See CRIMINAL LAW; INSTRUCTIONS.

RECEIPT.

See EVIDENCE.

RECEIVERS.

Authority to discharge a receiver for a purpose ancillary to the main object of the action is not invalidated by an appeal. 72 Cal. 572.

Appointment of a receiver in a certain divorce proceeding held improper. 75 Cal. 434.

The supreme court has no jurisdiction to appoint a receiver of the property of a corporation in *quo warranto* proceedings, upon judgment of forfeiture of its corporate charter. 84 Cal. 327.

The only parties whose interests can demand the appointment of a receiver, in a case where a corporate charter is forfeited, are its creditors and stockholders. 84 Cal. 327.

In insolvency proceedings, the functions of a receiver are not suspended by an appeal. 84 Cal. 7.

A receiver has power under the general laws of this state to bring and defend actions in his own name as receiver, to take and keep possession of the property, to receive rents, collect and compromise debts, to make transfers, and, generally, to do such acts respecting the property as the court may authorize. 84 Cal. 7.

Appointment of a receiver in a suit for partition of personal property held proper. 75 Cal. 319.

Appointment of a receiver in supplementary proceedings held proper. 78 Cal. 357.

Appointment of a receiver in insolvency proceedings held not amenable to a writ of prohibition. 78 Cal. 418.

Property cannot be secured from attachment by being placed in the hands of a receiver or bailee, even where the debtor is a foreign corporation. 81 Cal. 551.

The superior court, having jurisdiction to enforce a rescission, has jurisdiction to appoint a receiver of the moneys and securities in the state which have been delivered as the consideration of the contract rescinded, and this regardless of the residence of the defendant. 85 Cal. 11.

Receivers in partnership dissolution. 83 Cal. 474.

See BONDS; DEED; ESTOPPEL; PRESUMPTION.

RECLAMATION DISTRICTS.

See CONSTITUTIONAL LAW; MUNICIPAL CORPORATIONS; IRRIGATION DISTRICTS.

RECORDER.

See PUBLIC OFFICERS.

RECORDING.

Letters patent are not entitled to be recorded, under the laws of this state. 84 Cal. 567.

See BONA FIDE PURCHASER; DEED; HOME-STEAD; JUDGMENT; MECHANIC'S LIEN; LIES PENDENS; MORTGAGE; VERDICT.

RECORDS.

See APPEALS; BILL OF EXCEPTIONS; NEW TRIALS.

REDEMPTION.

See EXECUTION; FORECLOSURE; TAXATION; TAX SALE.

REFORMATION.

See DEED; EQUITY; FRAUD; MISTAKE; MARRIED WOMEN; PARTIES.

REHEARING.

Rehearing held constitutional without the signing of order therefor by supreme judges. 81 Cal. 408.

A superior court has no authority to grant a rehearing in an appeal. 77 Cal. 305.

See APPEALS; CONSTITUTIONAL LAW; JURISDICTION.

RELEASE.

A covenant not to sue must have a consideration. Section 1541 of the Civil Code applies only to formal releases purporting to be such, and not to those which might operate as such in an indirect way. 78 Cal. 552.

See ATTACHMENT; BONDS; SURETYSHIP.

RELIGIOUS SOCIETIES.

See BENEFICIAL ASSOCIATIONS; CORPORATIONS; CHURCH; PARTIES.

REMITTITUR.

See APPEALS; PRACTICE.

RENTS.

See LANDLORD AND TENANT.

REPAIRS.

See LANDLORD AND TENANT.

REPLEVIN.

See CLAIM AND DELIVERY; DAMAGES.

RES ADJUDICATA.

See ESTOPPEL; JUDGMENT; PLEADINGS.

RESCISSION.

The courts of this state have authority to rescind a contract for the purchase of a mine in Mexico, where the larger part of the consideration sought to be recovered back is in this state. 85 Cal. 11.

A purchaser who is dissatisfied with his contract may either rescind the contract, or ratify it and sue for damages. 85 Cal. 11.

It does not require mutual consent to rescind a contract for fraud or mistake. The rescinding party completes the rescission by a notice thereof and an offer to restore everything of value received. 85 Cal. 11.

An unreasonable delay in rescinding a sale of land will destroy the right, and is fatal to the action. 85 Cal. 522.

The first requisite of rescission is prompt action. A party cannot speculate on the contract to see whether it turns out bad or good. This is particularly true in a new country, where values change rapidly. 85 Cal. 522.

A party cannot defeat a note given for goods on the ground of fraud unless he has offered to return them. 78 Cal. 552.

An offer before suit to return the purchase-money is a condition precedent to the maintenance of an action to rescind a sale. 85 Cal. 522.

See CONTRACTS; FRAUD; SALE; VENDOR AND VENDEE.

RESIDENCE.

See ATTACHMENT; CHANGE OF VENUE; JURISDICTION; JUSTICES' COURTS.

RETURN.

See CLAIM AND DELIVERY; EXECUTION; SUMMONS.

REVENUE.

See PUBLIC OFFICER; TAXATION.

REWARD.

See PUBLIC OFFICERS; PUBLIC POLICY.

RIGHT OF WAY.

See CONDEMNATION OF LAND; DEDICATION;
EASEMENT; NUISANCE; RAILROAD.

RIPARIAN RIGHTS.

See PUBLIC LAND; QUIETING TITLE; WATER
RIGHTS.

ROADS.

See HIGHWAYS; RIGHT OF WAY.

RULES OF COURT.

A stipulation held not to obviate the necessity of filing a transcript within the time limited by the rules of the supreme court. 72 Cal. 89.

A trial court has power to suspend one or more of its rules in a particular case. 73 Cal. 307.

A rule of court requiring that a party who demands a jury trial must deposit the jury's fees is not illegal. 73 Cal. 176.

Under rule 3 of the supreme court, relating to the dismissal of a case for failure to file the transcript in time, fractions of a day will be considered. 87 Cal. 610.

Failure to serve a copy of the petition and writ of mandate upon the opposing party, as required by rule 28 of the supreme court, is ground for dismissing the petition. 87 Cal. 367.

A right to a jury trial is not waived by failure to demand it when the case is set for trial, notwithstanding the rule of court that a jury shall be then demanded. 70 Cal. 447.

Power of superior courts to enforce their rules. 86 Cal. 431.

SACRAMENTO.

See BONDS; MUNICIPAL CORPORATIONS.

SALARY.

See EMPLOYERS AND EMPLOYEES.

SALES.

Personal property is deliverable at the place where it is at the time of sale, unless

the seller has agreed to deliver it elsewhere, or an option as to the place of delivery is provided for. 84 Cal. 207.

An oral contract for the sale of wool, no part of which was accepted, held invalid and insufficient to support an action for damages for breach of contract. 68 Cal. 17.

Parol evidence held admissible to identify property mentioned in a bill of sale. 68 Cal. 169.

Retention of the property by the buyer, and other circumstances, held to be a waiver of alleged defects in the merchandise, by the vendee. 68 Cal. 205.

It seems that recognized custom will be presumed to form part of a contract by implication. 68 Cal. 522; 68 Cal. 205.

A sale of personal property, to be valid against creditors of the vendor, must be accompanied by an actual and continuous change of possession. 68 Cal. 11; 73 Cal. 399.

The fact that the vendor resided in the house as a lodger will not vitiate a sale of the household furniture as against creditors, where the vendee took open possession and continued to exercise ownership. 69 Cal. 247.

A sale of personal property is not void when made in payment of a debt, although the vendee knew that the effect of the sale would be to hinder and delay other creditors. 69 Cal. 247.

Where animals are sold, but die before delivery, the loss must be borne by the vendee. 69 Cal. 112.

Acquiescence in a stock sale held to waive the right to afterwards object to it. 69 Cal. 207.

It seems that in a suit in *assumpsit* to recover the value of goods sold and delivered, a general denial puts in issue the point as to whether the debt is yet due. 69 Cal. 83.

An oral contract for the sale of horses held void under the statute of frauds, as to such of them as had never been accepted. 70 Cal. 399.

An action for breach of warranty lies, even though the vendee has not rescinded the sale. 71 Cal. 142.

Damages for breach of contract to deliver a certain lot of hops held excessive. 71 Cal. 509.

Whether a contract by sale is executory or executed is a question of intention to be collected from the whole contract. 72 Cal. 293.

The mere reservation of a lien for the purchase price is invalid against creditors of the vendee. 72 Cal. 293.

A judgment is but evidence of a debt, and is not subject to levy or sale under execution. 72 Cal. 232.

Where the delivery is immediate, and the change of possession open and notorious for several months, the fact that the vendee was employed to handle the property as a stranger might be will not invalidate the sale. 73 Cal. 399.

Continuous possession under the statute of frauds need not be indefinite. When continued long enough to be notorious, the vendee may let or lend the property to the vendor without vitiating the sale, even as against creditors. 73 Cal. 400.

A creditor who has actual notice of an actual transfer will not be heard to raise the question that the change of possession was not sufficient. 73 Cal. 399.

An agreement for the sale of personal property, not accompanied by immediate delivery and change of possession, is void as to creditors, even where it is retained to secure the purchase price. 73 Cal. 320.

Such delivery as the nature of the case permits is required by the statute as to frauds to render the sale valid as against creditors of the vendee. 73 Cal. 211.

A sale of certain wheat, made in return for seed advanced, held void as to creditors. 74 Cal. 376.

Property never owned or possessed by the vendor is not governed by section 3440 of the Civil Code. 74 Cal. 46.

Parol evidence is not admissible to add to or contradict a bill of sale. 74 Cal. 459.

Sale of a stock in trade held shown to be accompanied by an immediate delivery and continuous change of possession. 75 Cal. 282.

To create an express warranty of a chattel, the word "warranty" is not necessary. Any affirmation on the faith of which the purchaser bought will be treated as a warranty. 75 Cal. 558.

One who agrees to sell a crop of fruit gives an implied warranty as to quality. 76 Cal. 212.

Where the terms are "cash on delivery," there is no sale without either the cash or the delivery. 76 Cal. 212.

If the goods are not identified, the title will not be presumed to pass, in the absence of other circumstances showing such to be the intent; the word "sold" is not conclusive. 76 Cal. 212.

Where the time of payment is left indefinite, the law implies payment on delivery. Delivery without such payment is a waiver of immediate payment, as a condition concurrent to obtaining title. 76 Cal. 217.

Identification of the articles sold is essential to the vesting of title in the vendee. 76 Cal. 216.

An agreement that a receipt and disposal of fruit shall not be deemed as an acceptance under a contract of sale held valid. 76 Cal. 221.

An executory contract of sale passes the title when the goods are delivered and inspected, and accepted by the vendee. 77 Cal. 139.

When goods sold by the vendor remain in possession of a pledgee, the title does not pass. 77 Cal. 140.

Transfer of personal property held void

for want of immediate delivery and continuous change of possession. 67 Cal. 283; 70 Cal. 560; 73 Cal. 320; 68 Cal. 11; 72 Cal. 293; 73 Cal. 320; 73 Cal. 211; 74 Cal. 376; 77 Cal. 544; 84 Cal. 168.

Transfers held valid. 73 Cal. 399; 66 Cal. 542; 69 Cal. 247; 78 Cal. 114; 84 Cal. 244.

Case where creditor was held estopped to question the validity of the transfer. 67 Cal. 137.

Parol evidence is permissible to identify goods delivered with those sold. 77 Cal. 140.

A sale without immediate delivery and continuous change of possession is void against the assignee in insolvency of the debtor, as also his executor or administrator. 77 Cal. 544; 70 Cal. 560.

A contract for the sale of growing crops need not be in writing under the statute of frauds. 77 Cal. 239.

Under a contract by which goods were to be delivered to a specified carrier for shipment, delivery to the carrier is delivery to the vendee, regardless of the buyer's right to weigh the goods when they reached him. 78 Cal. 439.

A verdict held supported by the evidence, as to immediate delivery and continuous change of possession, where a son claimed as vendee of his father. 78 Cal. 114.

A verdict in favor of vendor for the purchase price of a harvester that broke down on being used, and which the vendee promptly offered to return, held not sustained by the evidence. 78 Cal. 410.

The word "sold" does not necessarily mean that a conveyance must be made or that the title must pass. 83 Cal. 185.

In an action for damages for breach of contract of sales of harvesting-machines, the question as to whether the representations were intended as warranties held to be for the jury to decide. 83 Cal. 333.

Every person who manufactures an article under an order, for particular purpose, warrants by the sale of it that it is reasonably fit for such purpose. 83 Cal. 333.

The measure of damages for breach of warranty in a machine sold and returned is the price paid, with interest, and the expenses sustained in attempting to make the machine do the work intended. 83 Cal. 333.

Waiver of delay in promptly returning a defective chattel. 83 Cal. 333.

The statute requires immediate delivery, and actual and continuous change of possession, to validate a transfer as against creditors. 84 Cal. 168.

There is no sufficient change of possession when the property appears to remain in the same condition as before the sale, and there is nothing to notify third persons of the claims of the new owner. The possession of the vendee must be open and unequivocal, carrying with it the usual marks and indications of his ownership. 84 Cal. 168.

Change of possession of an interest in a band of cattle running at large on a ranch held sufficient as against creditors. 84 Cal. 244.

The word "actual" defined. 84 Cal. 168.

A party who desires to defend a claim for the purchase price of goods, on the grounds of a rescission of the sale, must have returned, or offered to return, the goods. 78 Cal. 552.

Title to personal property passes whenever the persons agree to a present transfer, and the thing is identified; instance of, in the sale of wheat. 86 Cal. 459.

A vendor who adopts a sale made by his agent is bound by the false representation of the agent. 78 Cal. 490.

An agreement to pay the outstanding debts of a firm, in consideration of a sale of its stock, cannot be defended in a suit brought by the creditors on the ground that the vendee did not get all that he bargained for. 82 Cal. 474.

The sale of pledged property, how made; validity. 82 Cal. 199.

A party who accepts and pays for a quantity of good delivered without reservation, and does not offer to return them, waives any defect in their quality, and cannot make such defects a ground of objection to receive the balance of the goods which are according to the contract. 87 Cal. 249.

See DELIVERY; FRAUDULENT CONVEYANCE; FRAUDULENT REPRESENTATION; MISTAKE; RESCISSION; STATUTE OF FRAUDS.

SAN FRANCISCO.

The interest of the city and county of San Francisco in its beach and water-lot property is a legal estate for ninety-nine years, and may be lost to it, by adverse possession, like other real property. 84 Cal. 124.

See BOUNDARIES; CONSTITUTIONAL LAW; COUNTIES; DEDICATION; MEXICAN GRANTS; MUNICIPAL CORPORATIONS; POLICE COURT; PUBLIC OFFICERS; STATUTE OF LIMITATIONS; STREET ASSESSMENTS.

SAN LUIS OBISPO COUNTY.

See MUNICIPAL CORPORATIONS; PUBLIC OFFICERS.

SAVINGS BANK.

See BANKS.

SCHOOLS AND SCHOOL DISTRICTS.

A school-warrant drawn by two trustees, one of whom is personally interested in it, is invalid. 77 Cal. 638.

Separate schools cannot be established for colored pupils. 82 Cal. 588.

A teacher elected by the San Francisco board of education, without limitation as to term, is entitled to hold her position, undemoted, while competent and faithful. 82 Cal. 486.

Mandamus is the proper remedy to restore a teacher to her position. 82 Cal. 483.

See PUBLIC OFFICERS.

SCHOOL-LANDS.

See PUBLIC LAND.

SEAL.

See CORPORATIONS; DEEDS; PRESUMPTIONS; NOTARY PUBLIC.

SEARCH-WARRANTS.

Search-warrants are not unconstitutional, and under their authority the person may be searched. 68 Cal. 284.

Knowledge requisite to make affidavit for search-warrant. 68 Cal. 284.

See CERTIORARI; CONSTITUTIONAL LAW; CONTEMPT.

SEDUCTION.

See CRIMINAL LAW.

SELF-DEFENSE.

See CRIMINAL LAW.

SENTENCE.

See CRIMINAL LAW.

SEPARATE PROPERTY.

See EQUITY; HOMESTEAD; HUSBAND AND WIFE; MARRIED WOMEN; PRESUMPTIONS.

SERVANT.

See EMPLOYERS AND EMPLOYEES.

SERVICIOR.

Sufficiency of service of notice of appeal. 69 Cal. 80; 71 Cal. 406; 72 Cal. 192; 72 Cal. 579; 73 Cal. 537; 74 Cal. 273.

Notice by mail need not be deposited in any particular post-office. 83 Cal. 574; overruling 73 Cal. 25.

Of writ of *certiorari*. 71 Cal. 583.

Of summons. 71 Cal. 504; 73 Cal. 187; 73 Cal. 599.

Of statement and notice on motion for a new trial. 72 Cal. 232; 77 Cal. 525; 80 Cal. 330; 81 Cal. 621; 82 Cal. 51; 83 Cal. 319; 83 Cal. 319; 73 Cal. 307.

Of notice upon an attorney. 73 Cal. 537.

Of notice by mail. 73 Cal. 307; 76 Cal. 376; 76 Cal. 618; 83 Cal. 574.

See APPEALS; EMPLOYER AND EMPLOYEE; NEW TRIAL.

SET-OFF.

See COUNTERCLAIM; PLEADINGS; PRACTICE.

SETTLEMENT.

See APPEAL; EXCEPTION; NEW TRIAL.

SETTLER.

See PUBLIC LANDS.

SHERIFF.

See ATTACHMENT; BONDS; COUNTIES; EXECUTION; NEGLIGENCE; PUBLIC OFFICER; PUBLIC POLICY.

SHERIFF'S DEED.

See CERTIFICATE OF SALE; EXECUTION.

SHORTHAND REPORTER.

The compensation of a shorthand reporter who acts under the appointment of the justice of the peace in taking down criminal evidence is to be fixed by the magistrate. The county auditor must draw his warrant for the amount properly allowed. 83 Cal. 361.

The act of March 21, 1895, as to salaries of official court reporters declared unconstitutional, as imposing legal functions on the judiciary. 68 Cal. 194.

Shorthand reporter's fees, how paid by litigants, and when proper to be allowed as costs. 86 Cal. 493.

See CRIMINAL LAW; EVIDENCE.

SLANDER.

To falsely speak of a married woman as a "paramour" is actionable. 68 Cal. 192.

An objectionable charge in an answer filed may be withdrawn. 68 Cal. 109.

In an action for calling plaintiff a "thief and scoundrel," the testimony of defendant, that when he said so he believed that his property had been stolen, is admissible. 68 Cal. 109.

A certain complaint for slandering a woman held to state a cause of action. 70 Cal. 216.

Where the words are ambiguous, their meaning is for the jury to determine. 70 Cal. 216.

In action for slander of title, a nonsuit is proper when it appears that the title is disputed between the parties. 70 Cal. 135.

In slander, evidence of the financial condition of defendant is admissible on behalf of plaintiff. 74 Cal. 1.

A board of supervisors cannot rescind a contract because the party has slandered them. 74 Cal. 502.

No words other than those set out in the complaint are admissible in a slander suit. 77 Cal. 340.

An answer that has been amended is not admissible in a slander suit. 77 Cal. 340.

Where the answer admits that the words were false, it is error to instruct the jury that the plaintiff must prove them false. 81 Cal. 302.

It is error to refuse to strike out testimony as to slanderous words not mentioned in the complaint. 77 Cal. 34.

A scandalous charge against a candidate for office is actionable even if but a repetition of another's words. 81 Cal. 302.

Words imputing a want of chastity are scandalous *per se*. 82 Cal. 523.

Where evidence of character is allowed to be given without objection, the point will not be considered on appeal. 82 Cal. 528.

Whether section 461, Code of Civil Procedure, has abrogated the common-law rule which allowed the character of the plaintiff in a slander suit to be attacked, not decided. 82 Cal. 528.

The words "you thief," "you swindler," "you scoundrel," held actionable, and in such case it was not necessary to aver special damage. 84 Cal. 177.

SOLDIERS' ADDITIONAL HOMESTEAD.

See AGENCY; PUBLIC LANDS.

SPECIAL ADMINISTRATOR.

See PROBATE LAW.

SPECIFIC PERFORMANCE.

An offer held not made in a reasonable time. 68 Cal. 414.

Part performance must be specifically set up in detail. 68 Cal. 414.

Delay held to bar the right to. 69 Cal. 622.

It is essential for specific performance that the thing agreed to be done should be definite and certain in its terms, and the proof must be clear and satisfactory. 70 Cal. 553; 76 Cal. 535.

Cases in which the plaintiff was held to have waived his right. 70 Cal. 555; 70 Cal. 608.

A parol contract for insurance may be enforced under specific performance. 73 Cal. 216.

Fraudulent misrepresentation for the purpose of defrauding third persons is a defense to specific performance. 74 Cal. 557.

A written contract for the sale of real property, not authorized by the owner, cannot be enforced against his administrator. 74 Cal. 284.

Costs ought not to be awarded against an innocent party. 74 Cal. 565.

Laches held to bar specific performance on a contract for the sale of land. 76 Cal. 590; 76 Cal. 84.

Where a defendant cannot perform in full, he may be made to perform in part. 76 Cal. 299.

A parol contract to convey on condition of residence and the making of improvements, if partly executed by plaintiff, will be enforced. 77 Cal. 315.

A contract to convey may be set up by way of cross-complaint in ejectment. 77 Cal. 427.

A contract held sufficiently certain. 77 Cal. 427.

Adequacy of consideration is essential to a suit to specific performance of contract. 77 Cal. 114; 79 Cal. 504.

Adequate consideration means a fair consideration at the time of the contract. 77 Cal. 114.

Where the contract provides for a conveyance, and also for the payment of a certain sum, the complaint is not demurrable that asks for the enforcement of the entire contract. 83 Cal. 66.

Sufficiency of memoranda to satisfy the statute of frauds. 83 Cal. 66.

Specific performance in favor of an attorney for an interest in his client's land. 79 Cal. 804.

Instance where the defendant is estopped from denying the authority of his agent to make the contract. 80 Cal. 90.

Pleadings and constructions, generally, in action for specific performance. 82 Cal. 533.

Defective title, when a bar to. 82 Cal. 24.

A verbal contract for the sale of land will be enforced when the vendee has taken actual possession with the vendor's consent, or by making valuable improvements thereon. 84 Cal. 249.

An option for the purchase of real estate may be specifically enforced. 84 Cal. 249.

Where time is made of the essence of a contract for the sale of land, the expiration of the time ends the contract, which cannot thereafter be enforced by either party. 84 Cal. 316.

Where it is provided that a certain installment in payment should be "forfeited," such payment will be construed to mean liquidated damages. 84 Cal. 316.

The money paid as a forfeit remains as money had and received for the use of the purchaser, subject to be recovered by him, less the damages recouped for the failure. Such damages must be specially pleaded. 84 Cal. 316.

See CONTRACT; EQUITY; LACHES; TENDER; TRUSTS; VENDOR AND VENDEE.

SPIRITUALISM.

The relationship between a medium and a person who believes in spiritualism is confidential, and all contracts between them to the advantage of the medium are presumed to have been obtained under undue influence. 72 Cal. 556.

Courts will not hold belief in spiritualism superstitious, or contrary to public policy, when not followed by acts which are recognized as hurtful to society. 77 Cal. 22.

STARE DECISIS.

A decision is not even authority, except upon the point actually passed upon by the court, and directly involved in the case. 84 Cal. 143.

STATED ACCOUNTS.

See ACCOUNT; STATUTES OF LIMITATION.

STATE LIBRARIAN.

See PUBLIC OFFICERS.

STATEMENT.

See APPEAL; JUSTICES' COURTS; NEW TRIAL.

STATE OF CALIFORNIA.

When a state authorizes itself to be sued, the proceedings are like those against a private person. 73 Cal. 29.

Responsibility of the state for damages, how measured. 73 Cal. 29.

Statutes of limitations run against the state on a cause of action against its ex-secratory, the same as if it were a private individual. Such action is barred in two years from the date of his default. 73 Cal. 574.

STATUTES.

Statutes will be reconciled, if possible; but where this cannot be done, the last act must prevail. 68 Cal. 294.

A statute does not generally take effect until the sixtieth day after its passage. 74 Cal. 222.

An act on the same precise subject, but with different penalties, repeals the previous ones, where conflicting. 75 Cal. 147; 79 Cal. 463.

Words in a statute are presumed to be used in their ordinary sense. 76 Cal. 269.

Statutes will not be held invalid because they do not appear upon the legislative journals. 80 Cal. 211.

Construction of an inhibitory clause in a statute. 81 Cal. 217.

Whether a general statute repeals a special one by implication is a question of intention, to be gathered from the language used, and from the subject-matter. 87 Cal. 124.

A statute remedial in its objects will be construed so as to suppress the mischief and advance the remedy. 86 Cal. 639.

Sections 1185 and 1192 of the Code of Civil Procedure should be so construed as to give effect to both. One is general; the other special. 80 Cal. 275.

A statute that shortens the time for filing a lien applies to existing contracts, and is not invalid. 85 Cal. 80.

See CODES.

STATUTE OF FRAUDS.

Parol gift of land held void under. 73 Cal. 415.

Transfer of mining claim void under. 73 Cal. 541.

Contract not to be performed in a year void under. 73 Cal. 13.

Sufficiency of memoranda under. 83 Cal. 66.

Verbal agreements as to boundaries held not within the statute of frauds. 75 Cal. 610.

A broker cannot recover a commission on the sale of land unless his authority is in writing. 75 Cal. 509.

The statute of frauds is no bar to relief in constructive fraud. 75 Cal. 525.

Where a verbal promise is in the nature of a guaranty of payment for goods sold to another, the obligation is void. 81 Cal. 280.

An agreement for consideration, allowing a party to hold a certain article as a pledge, is not within the statute of frauds. 76 Cal. 171.

An express trust in land cannot be created by parol. 76 Cal. 469.

A complaint on a contract within the statute of frauds need not allege that such contract was in writing. It will be presumed to be in writing on demurrer. 84 Cal. 279.

An executed verbal promise to answer for another's default cannot be afterwards questioned. 77 Cal. 79.

It is not necessary in a complaint to show that the contract was in writing. 77 Cal. 427.

Marriage is not such part performance of a parol contract to convey as will take it out of the statute of frauds. 77 Cal. 106.

Evidence of delivery and change of possession held sufficient as against a creditor. 78 Cal. 113.

A partnership agreement to deal in real estate is within the statute of frauds. 79 Cal. 23.

The statute of frauds as a defense need not be specially pleaded. 79 Cal. 525.

A deed generally cannot be avoided by proof of parol agreement to hold in trust. 79 Cal. 525; 80 Cal. 514.

A contract to pay plaintiff a certain sum for all the lands that he should examine is not within the statute of frauds. 85 Cal. 598.

A certain memorandum showing employment of real estate broker held sufficient. 86 Cal. 639.

A written contract made in the presence of a principal in his behalf, with his consent, to convey certain lands, is sufficiently in writing to take the agreement out of the statute of frauds. 80 Cal. 90.

A verbal contract, partly performed, under which one, in return for the erection of a dwelling and his support during life, promises to give a life estate in certain lands, is not within the statute of frauds, and may be enforced. 81 Cal. 205.

A certain agreement between vendor and

vendee held void under the statute of frauds. 82 Cal. 84.

Certain contracts held void under. 70 Cal. 399; 71 Cal. 14.

See AGENCY; DEEDS; FRAUD; MORTGAGE; PLEADINGS; SALES; TRUST.

STATUTE OF LIMITATIONS.

The statute of limitations must be specially pleaded as a defense. 68 Cal. 466; 68 Cal. 210.

As a defense, it must be taken by either demurrer or answer. 68 Cal. 390.

Plea of, in actions for real property in the language of the code is sufficient. 68 Cal. 348; 74 Cal. 11.

Where the plaintiff amends his complaint the defendant has a right to amend his answer thereto, by pleading the statute of limitations. 68 Cal. 306.

The statute of limitation does not begin to run against a purchaser at an execution sale until he receives his deed. 68 Cal. 116.

Plea of, held not sustained by the evidence. 68 Cal. 317.

Under a plea of title under the statute it is proper to show the use made of the premises. 68 Cal. 618.

The statute begins to run against a "due-bill" from the date of its delivery. 69 Cal. 550.

The statute applies to both suits at law and equity. 69 Cal. 255.

Section 343 of the Code of Civil Procedure is applicable to suits in equity. 69 Cal. 255.

The statute does not run in favor of a public officer until a demand is made for the funds in his hands. 69 Cal. 531.

A written agreement for arbitration does not prevent the running of the statute. 70 Cal. 412.

Five years' adverse claim and use of water, to the knowledge and injury of the owner, vests title in the claimant. 70 Cal. 345.

Findings as to the statute of limitation held supported by evidence, and sufficient. 70 Cal. 345.

A finding that the allegations in the complaint are true held sufficient in this particular case. 70 Cal. 345.

The plea of section 337 of the Code of Civil Procedure cannot apply in a suit to quiet title. 70 Cal. 507.

Possession and payment of taxes are essential to title under the statute. 71 Cal. 88.

Three years' limitation applies to all suits relating to fraud. 71 Cal. 513.

The statute begins to run in favor of the tax collector of San Francisco at the end of his term, without any demand. 71 Cal. 153.

The right to have a party in possession of

land declared a trustee held barred by the statute. 71 Cal. 124.

Proof of payment of taxes is admissible under a plea of the statute. 71 Cal. 470.

The defense of the statute cannot be taken by demurrer, if it does not clearly appear on the face of the complaint. 72 Cal. 544.

The statute begins to run in torts when the wrongful act is done. 72 Cal. 585; 72 Cal. 334.

A cause of action for malicious burning is a trespass, barred in three years. 72 Cal. 334.

Statutes of limitation run in favor of the trustee of an implied trust, without any repudiation by him. The time is four years. 72 Cal. 363.

Judgments held in the state are governed by the statute of limitations of this state, and not by the law of the state where the judgment is obtained. 72 Cal. 264.

An objection to the sufficiency of a plea of the statute will not be considered on appeal, where the case was tried on the theory that it was sufficient. 72 Cal. 598.

Findings in a water case on the issues of the statute held proper, and supported by the evidence. 72 Cal. 598.

Failure to find on the plea of the statute of limitation is generally a fatal error. 72 Cal. 86.

A cause of action by the state against a state officer is affected by the statute of limitation the same as if a natural person. 73 Cal. 574.

The statute runs in favor of a public officer on the date when he should have paid over public money, and not from the date of a demand. 73 Cal. 574.

The defense of the statute of limitation must not only give the section, but the subdivision of the section, if such there be. 73 Cal. 420.

Pending an appeal from an order refusing to allow new matter to be set up in a complaint, the statute of limitation does not run against such matter. 73 Cal. 452.

Under the law of 1862, an action barred against an administrator is barred also against a devisee, even if a minor. 73 Cal. 329.

If a person against whom the statute as to real property has begun to run dies, it continues to run against his successor, though a minor. 73 Cal. 329.

The statute of limitation may be pleaded by reference to the section of the code. 74 Cal. 11.

A stockholder's liability is governed by the three years' limitation. 74 Cal. 167.

The statute of limitation does not begin to run as against the correction of a mistake until its discovery. 74 Cal. 301.

The statute is waived unless pleaded by demurrer or answer. 75 Cal. 253.

Where the statute is pleaded, a finding of a

fact that takes it out of the statute is proper. 75 Cal. 566.

When the court finds in favor of defendant on the plea of the statute, and it does not appear that any taxes were ever levied, a finding as to the payment of taxes is immaterial. 75 Cal. 117. *Per contra*, 80 Cal. 605.

The limitation of an action against a tax collector is four years. 76 Cal. 606.

The question as to whether the contract for which the contract sued upon was executed outlived at the time is immaterial. 76 Cal. 355.

The fact that a person who is in exclusive possession under an invalid tax deed does not think that he is interfering with any person's claim does not defeat his adverse possession, but makes it stronger. 77 Cal. 579.

Statute of limitation as to a railroad bed. 77 Cal. 300.

Adverse possession, to constitute title by prescription, must be continuous for the full period of limitation. Any adverse interruption of possession is fatal. 85 Cal. 622.

Adverse possession, to be the basis of a title to real property under the statute of limitation, must be actual, open, notorious, hostile, continuous, uninterrupted, and under a claim of title. Proof that all taxes have been paid or none levied is also essential. 71 Cal. 459; 80 Cal. 607.

Statute of limitation as to right of heirs and devisees to recover real property. 79 Cal. 14.

Findings as to adverse possession held insufficient. 79 Cal. 140.

Statute of limitation for breach of official bond does not begin to run until the end of the official term. 79 Cal. 84.

Statute of limitation does not begin to run as against the holder of a patent for a Mexican grant until the patent is issued. 79 Cal. 140. See 84 Cal. 143.

Section 1573 of the Code of Civil Procedure held to apply to actions by heirs to quiet title. 82 Cal. 174.

The statute runs against the co-tenant from time of ouster, even though the same was submitted to under a mistake of fact or law. 82 Cal. 72.

Neither section 315 nor 316 of the Code of Civil Procedure has any application where a state patent is issued, when not more than five years of the ten years' limit against the state has run. 83 Cal. 279.

Under the code, the statute runs against Mexican grants, without regard to the confirmation of survey or grant, or the issuance of patent. 84 Cal. 143.

The statute of limitation in reference to malicious prosecution of civil actions construed. 84 Cal. 89.

A judgment foreclosing a mortgage cannot support the execution after five years

from the date of its rendition. 86 Cal. 384.

An order staying proceedings on a judgment does not suspend the running of the statute of limitation for its enforcement. 86 Cal. 275.

A homestead may be extinguished under the statute of limitations. 82 Cal. 72.

See ADVERSE POSSESSION; EJECTMENT; PLEADINGS; SANITY.

STOCK.

See CORPORATION; PLEDGE; SALE.

STOCKHOLDER.

See CORPORATIONS.

STREETS.

The San José ordinance against the obstruction of sidewalks, and prescribing a penalty, is constitutional and valid. 87 Cal. 91.

Municipal corporations may legalize a partial obstruction of a street or sidewalk which would otherwise be a public nuisance. 87 Cal. 91.

Where a complaint states facts which show a violation of both the city ordinance and the Penal Code, and both are within the jurisdiction of the justice's court, and the judgment is within the limits prescribed by the statute, the defendant will not be discharged on *habeas corpus*. 87 Cal. 91.

No right can be acquired by prescription to obstruct a sidewalk or street of a city. 87 Cal. 91.

The dedication of a street to public use authorizes the use of the street for the track of a street-car company under license by the city authority without compensation to the owner of the fee. 87 Cal. 397.

The track of a street-car company should, in the absence of special indication, be laid as nearly as practicable in the middle of the street. 87 Cal. 597.

See HIGHWAYS.

STREET ASSESSMENT.

Act of 1873 to revive contract and validate assessment for grading Montgomery Avenue held unconstitutional. 68 Cal. 428.

Foreclosure of junior assessment does not invalidate prior liens when. 68 Cal. 78.

Assessment for too much is only void as to excess. 69 Cal. 637.

A second amended assessment held valid. 69 Cal. 637.

Extension of time for performance of contract invalid when. 69 Cal. 454; 80 Cal. 1. Certain acts relating thereto construed. 69 Cal. 465.

Power of Oakland city council to let work on streets by contract. 70 Cal. 534.

Records of Oakland street assessments as evidence of assessment to unknown owners. 70 Cal. 534.

Evidence as to want of authority in action on street assessments. 70 Cal. 136.

Action by contractor under act of April 4, 1870. 72 Cal. 154; 72 Cal. 146.

Width of street; designation on official map. 72 Cal. 146.

Action to foreclose under act of April 1, 1872; necessary parties. 72 Cal. 229.

Action to restrain enforcement of assessment in Los Angeles. 72 Cal. 367.

Widening Dupont Street. 72 Cal. 404.

Tacit acquiescence as an estoppel. 72 Cal. 404.

Street crossings not included in order of supervisors. 75 Cal. 360.

Grading Bay Street, San Francisco. 75 Cal. 534.

Assessment on improper lot void. 76 Cal. 103.

Work not included in contract. 76 Cal. 134.

Evidence that block had been graded. 76 Cal. 149.

Omission of lot invalidates the whole assessment. 79 Cal. 449.

Act of March 19, 1878, held supplementary. 79 Cal. 282.

Void proceedings to establish grades. 76 Cal. 222.

Napa Street ordinance construed. 76 Cal. 222.

Countersigning warrant under consolidation act. 76 Cal. 545.

Second assessment, after first was declared void. 76 Cal. 545.

Evidence to establish official grade of streets. 78 Cal. 637.

Assessment void in part, void in whole. 78 Cal. 637.

Contract for street improvement made before the new constitution. 79 Cal. 45; 79 Cal. 278.

Authority for, under Oakland charter. 79 Cal. 45.

Judgment on findings on appeal. 79 Cal. 439.

Invalid assessment on private street. 79 Cal. 449.

Action for unfinished work. 80 Cal. 1.

Appeal to board of supervisors. 80 Cal. 8.

Apportionment in accordance with frontage. 80 Cal. 8.

Construction of sewer on Montgomery Avenue. 82 Cal. 11.

In an action to foreclose a street assessment, where the answer alleges that the street had never been dedicated to the public, it is error to fail to find on the issue thus

raised, where the evidence shows that it had been so dedicated. 84 Cal. 141. See 79 Cal. 449.

The act of 1885 in relation to street improvements construed. 86 Cal. 465.

After a property owner has protested against street-work, a promise to pay cannot be implied from the fact that he saw the work done without further objection, and made suggestions to the workmen as to the proper mode of doing it. 84 Cal. 539.

If one assessment is valid, the superintendent cannot be required to make another. 87 Cal. 576.

Contractors are not entitled to an assessment for street-work done outside of the limits authorized by the resolution of intention. 87 Cal. 576.

An assessment for street-work, including work not authorized by the resolution, may be corrected by appealing to the city council. Failure to take such an appeal is conclusive on both owner and contractor. 87 Cal. 576.

An illegal assessment creates no lien upon the land assessed, and the owner is not required to appeal to the city council. 87 Cal. 576.

Under the act of 1871-72, all of the owners of the property assessed must be made defendants. Otherwise the lien cannot be enforced against any of the owners. 87 Cal. 11.

Where an inferior court or board of supervisors has jurisdiction of the parties, it is its duty to decide as to its jurisdiction over the subject-matter, and such decision is conclusive against collateral attack. 87 Cal. 40.

The failure of an owner of land on which a street assessment is attempted to be levied waives his objection by failing to file the remonstrance according to law. 87 Cal. 40.

An appeal to the board of supervisors is the only remedy for any grievance caused by the official act of the superintendent of streets. 87 Cal. 40.

The foreclosure of a lien upon one lot under the act of March, 1885, is not a bar to an action to foreclose a lien on another lot owned by the same person. 87 Cal. 214.

The expenses of street improvement is a lien against the property benefited, but is not a personal charge against the owner. 87 Cal. 214.

The attorney's fees mentioned in the act may be allowed against each lot, although owned by the same person. 87 Cal. 214.

Where the warrant of assessment was properly signed by the superintendent, and countersigned by the mayor, the fact that the name of the mayor was omitted from the record does not render the recording ineffectual. 87 Cal. 214.

The fact that a portion of the street sought to be improved had been divided by a cross-street which had been previously graded does not invalidate the assessment. 87 Cal. 40.

SUBLETTING.

See LANDLORD AND TENANT.

SUBROGATION.

A purchaser of land at an execution sale, before the redemption, is entitled to be subrogated to a superior lien in the nature of a mortgage executed by the debtor. 78 Cal. 600.

SUBSCRIPTION.

See CONTRACTS; CORPORATIONS.

SUMMONS.

Dismissal of action for want of service of. 69 Cal. 523.

Affidavit for publication of; insufficiency. 70 Cal. 431; 72 Cal. 65.

Proof of service of by a notary. 70 Cal. 431.

Service under a fictitious name. 70 Cal. 23.

Service by publication against non-resident will not support a personal judgment, but the attachment lien is valid. 72 Cal. 65.

Proceedings in service by publication. 72 Cal. 65.

Deposit of copy in post-office. 72 Cal. 65.

Irregularity of *alias* summons not jurisdictional. 72 Cal. 232.

A summons is sufficient if it states the nature of the action in general terms. It is unnecessary to state whether the money sought to be recovered accrued from work or from the sale of goods, or the kind of lien sought to be foreclosed, or give a description of the property. 83 Cal. 368.

Failure of summons to state nature of action, or to notify defendant to appear, does not affect jurisdiction. 72 Cal. 232.

Essentials to service by publication must be shown on the record. 73 Cal. 539.

Immaterial variance in copy disregarded. 73 Cal. 187.

Service of summons by publication, in divorce, valid. 75 Cal. 213.

Amended affidavits of publication after judgment. 75 Cal. 213.

Signature of clerk to, may be printed, when seal is affixed. 76 Cal. 610.

Affidavit for publication showing cause of action. 76 Cal. 610.

Statement as to defendant's residence. 76 Cal. 601; 76 Cal. 646.

Where defendant is a non-resident, proof of due diligence is surplusage. 76 Cal. 646.

Order of publication, on what based. 76 Cal. 610.

Provisions of the Code of Civil Procedure

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relating to service of summons by publication are not invalid because they include proceedings *in personam*. 86 Cal. 580.

Summons served by the deputy sheriff must be in the name of his principal, to be official. 86 Cal. 395.

The clerk has no authority to enter the default of a defendant upon a void certificate of service of summons. 86 Cal. 395.

Proof of service of summons is necessary to give a court jurisdiction to render judgment. 86 Cal. 395.

A finding of due service of summons will not avail as against the evidence found in the judgment roll. 86 Cal. 395.

Constructive service of summons by publication and posting under the Wright irrigation act held sufficient to sustain a judgment *in rem*. 87 Cal. 140.

The probate of a will, proceedings under the irrigation law, and proceedings taken for the purpose of street assessments are instances where jurisdiction may be obtained to render a judgment *in rem* without personal service of summons. 87 Cal. 148.

A court does not acquire jurisdiction by the mere service of summons further than as to the complaint on which such summons is issued. 87 Cal. 152.

All courts have the right to pass on their own jurisdiction as to subject-matter. 87 Cal. 40.

Service of summons out of state can be made only after order for publication. 77 Cal. 507.

Defects in summons are waived by answering to the merits. 78 Cal. 225.

Deposit of summons in post-office. 78 Cal. 34; 72 Cal. 65.

The complaint as amended should be deposited in post-office. 78 Cal. 34.

See AMENDMENT; ATTACHMENT; DEFAULT; DIVORCE; EMINENT DOMAIN; JUDGMENT; JURISDICTION; MINORS; PARTNERSHIP; PRACTICE.

SUPREME COURT COMMISSIONERS.

Every presumption is in favor of the constitutionality of a legislative enactment. The act providing for the appointment of the supreme court commissioners is constitutional and valid, and does not vest such commissioners with judicial powers. 83 Cal. 111.

SURETYSHIP.

If the obligee knows, when the bond is given, that the obligor is a defaulter, and conceals it from the sureties, it operates to relieve them. 68 Cal. 208.

Prior to section 1543 of the Civil Code, a

release of one co-surety released the others. 68 Cal. 82.

Sureties are exonerated if the obligee retains the obligor in his trust after discovery of defaulting. 70 Cal. 108.

Suretyship, corporation's, held valid. 72 Cal. 12.

One or more sureties on a bond may be joined as parties defendant. 73 Cal. 265.

Form of judgment against sureties. 73 Cal. 265.

Where a defaulter has held office for several terms, his defaulting will be presumed to have been in his last term. 73 Cal. 265.

Indorsement of suretyship on a note for value held suretyship. 74 Cal. 409.

A surety on an instrument, on being compelled to pay it, becomes the equitable owner thereof. 74 Cal. 409.

Defects or omissions in an official bond not relating to defendant's obligation cannot be set up as a defense in a suit against them on the bond. 74 Cal. 374.

Application under section 709 of the Code of Civil Procedure, by a surety, to enforce contribution against a co-surety, must be on notice. 75 Cal. 261.

A bond for a term, and any subsequent term to which a person might be elected, is presumptively executed with consideration, and valid. 75 Cal. 513.

The general rule is, that a surety can only recover from the principal the amount or value which he has actually paid on his account. 83 Cal. 547.

More conditional payment by a surety by means of a promissory note will not justify a judgment against the principal. 83 Cal. 547.

Undertaking on appeal may be by corporation as sole suretyship. 72 Cal. 12.

The liability of a principal to each surety not founded upon an instrument in writing is barred in two years from the date of the payment. 83 Cal. 547.

A surety who is apparently a maker, but known to be a surety, is not entitled to a demand on the principal, and notice of default; his rights are those of a guarantor. 77 Cal. 476.

A surety's liability is not affected by a failure of the payee to present a claim against the debtor's estate. 77 Cal. 54.

A wife who mortgages her property to insure her husband's contract is merely a surety. 77 Cal. 54.

The discharge of one surety on an official bond does not release the others. 77 Cal. 46.

Liability of surety on bond of assignee in insolvency. 78 Cal. 217.

Demand on principal is not necessary to hold sureties on a bond in proceedings to condemn land. 78 Cal. 443.

The decision in 60 Cal. 348, and in 65 Cal. 243, as to sureties' liability, qualified. 78 Cal. 443.

Where a bond recites an appointment, a

surety cannot deny such appointment. 78 Cal. 154.

Failure to have a bond approved will not invalidate it. 78 Cal. 154.

Case in which the bondsmen of a United States contractor were held not liable. 85 Cal. 402.

The sureties of the treasurer of the city and county of San Francisco held liable for a warrant illegally paid for Dupont Street improvements. 85 Cal. 148.

The by-laws of a savings bank, describing the duties of its secretary, are impliedly part of the bond of its secretary. 81 Cal. 528.

See ATTACHMENT; BONDS; GUARDIAN AND WARD; INJUNCTION; PROBATE LAW; PROMISSORY NOTE; PUBLIC OFFICERS; MECHANICS' LIENS; SPECIFIC PERFORMANCE.

SURVEYOR-GENERAL.

See APPROPRIATIONS; PUBLIC LANDS; SWAMP AND OVERFLOWED LANDS.

SWAMP AND OVERFLOWED LANDS.

Certificate of purchase. 81 Cal. 87.

State ownership of. 69 Cal. 255.

Application to purchase. 74 Cal. 175.

Reclamation of. 70 Cal. 566.

Contest over right to purchase. 74 Cal. 175; 78 Cal. 116.

View by commissioners. 70 Cal. 566.

Refunding purchase price. 74 Cal. 397.

Assessment to reclaim. 71 Cal. 72; 75 Cal. 443.

Cancellation of patent. 73 Cal. 376.

Representations as to charter. 71 Cal. 50.

Act of September 28, 1850. 73 Cal. 60.

Oath of commissioners. 75 Cal. 443.

Approval by surveyor-general. 73 Cal. 61.

Issuance of patent for. 81 Cal. 87.

Affidavit of purchaser. 73 Cal. 625.

Priority of right to. 82 Cal. 139.

Reclamation districts. 73 Cal. 125.

Construction of levees. 73 Cal. 125.

Levee taxes. 73 Cal. 236.

Falsehood in affidavit invalidates applicant's rights. 82 Cal. 139.

Knowledge of the boundaries of the land is sufficient where three out of four surveyors' stakes are known. 83 Cal. 1.

The official plat in the United States surveyor-general's office, showing certain land to be swamp and overflowed, is conclusive as to the character of such land between the state and the United States. 83 Cal. 279.

The title of the state was vested in the applicant for such lands by the curative act of March, 1872, upon his making full payment, provided no other application was made prior thereto. 85 Cal. 533.

TAXATION.

Jurisdiction of state board of equalization. 68 Cal. 495; 83 Cal. 393.

Assessment to all "owners and claimants," held void on its face. 78 Cal. 144; 80 Cal. 74.

Assessment of improvements. 76 Cal. 264.

Void assessments. 68 Cal. 551; 69 Cal. 590; 78 Cal. 450; 78 Cal. 144.

Redemption from tax sales. 79 Cal. 537.

General essentials of tax deeds. 79 Cal. 537; 80 Cal. 393.

Sufficiency of description. 80 Cal. 86.

Certificates of sale. 80 Cal. 74.

Sufficiency of assessment. 68 Cal. 14.

Sale for excessive amount is void. 76 Cal. 269; 79 Cal. 137; 80 Cal. 393.

Delinquent taxes. 68 Cal. 495; 73 Cal. 610; 73 Cal. 621; 76 Cal. 269.

Collection of Stockton City taxes. 73 Cal. 621.

Railroad in several counties. 68 Cal. 551.

Law for taxation of railroads in several counties held unconstitutional. 83 Cal. 393.

Interest on delinquent taxes. 68 Cal. 495; 68 Cal. 551; 76 Cal. 269.

Assessment to wrong person. 68 Cal. 551; 68 Cal. 590.

Board of equalization. 82 Cal. 214; 83 Cal. 393.

Invalid assessment. 68 Cal. 551; 68 Cal. 590; 69 Cal. 538; 74 Cal. 430; 83 Cal. 393.

Void tax sale. 71 Cal. 183.

Road taxes, mode of levy. 71 Cal. 599.

Void tax deed. 68 Cal. 590; 76 Cal. 136; 79 Cal. 537.

Assessment of town lots. 73 Cal. 43; 70 Cal. 504.

Recovery back of illegal taxes. 68 Cal. 241; 80 Cal. 86; 78 Cal. 450.

Payment of money into treasury. 69 Cal. 647.

Sacramento City taxation. 70 Cal. 504; 71 Cal. 310.

Taxation on personal property, discretion of assessor. 71 Cal. 205.

Municipal taxations. 72 Cal. 166.

Mortgage taxation. 72 Cal. 34; 77 Cal. 136.

Assessment roll as evidence. 75 Cal. 172.

San Diego taxation. 77 Cal. 511.

Recitals in deed. 80 Cal. 393.

The sufficiency of a complaint, in an action to recover delinquent taxes, must be tested by the rules regulating pleadings in civil actions. 83 Cal. 393.

All proceedings relating to taxation must strictly conform to the law. 85 Cal. 196.

An assessor cannot make an arbitrary assessment, unless the owner neglects or refuses to make a statement under oath. If he considers the statement false, he can either subpoena the parties for examination, or prosecute them for perjury. 85 Cal. 196.

To make a party liable for taxes on property in his possession or control, his possession must be such as denotes apparent ownership. A mere bondholder is not such a person. 85 Cal. 196.

A tax levied on an improper assessment creates no lien upon any property, and an injunction will lie to restrain the sale thereof for such delinquent tax. 85 Cal. 196.

It is the duty of the assessor to assess property to the owner, or if he cannot ascertain the owner, to "unknown owners," and proceed at once to collect the tax by a seizure and sale. 85 Cal. 196.

Under the Political Code as amended in 1880, no mistake in the name of the owner of real property can render the assessment invalid. The ascertainment of the name of the owner is discretionary with the assessor, and his judgment in regard to it is conclusive. 86 Cal. 122.

Time for redemption, how computed. 86 Cal. 123.

A tax deed conveys no title where the notice required by section 3785 of the Political Code was not given. 86 Cal. 122.

In a suit against a railroad corporation for delinquent taxes, there must be an averment of its incorporation; a showing that the defendant is the owner of the property; the authority of a state board to make the assessment; when, where, and by whom the taxes were levied, and how and when the defendant became indebted for such taxes. 83 Cal. 393.

The scheme for the assessment, levy, and collection of taxes on railroads situated in more than one county, prescribed by sections 3665-3679 of the Political Code, is unconstitutional. 83 Cal. 393.

A complaint against an assessor for willfully assessing the lands of plaintiff at an excessive value held not to state a cause of action. 83 Cal. 447.

Mortgaged property must be so assessed as to show by itself that the value of the mortgage is deducted from the value of the land, and the remainder must appear separately in the assessment of the mortgagor. 84 Cal. 299.

An assessment which does not show what road district the land is in is defective. 84 Cal. 299.

Section 3649 of the Political Code, providing for the reassessment of property which has escaped assessment in the preceding year, is not unconstitutional. 87 Cal. 499.

An assessment not made as prescribed by the statute is invalid. 87 Cal. 499.

Section 871 of the municipal corporation act does not forbid the city council from selecting the time for the assessment, collection, and levy of taxes. 87 Cal. 499.

If part of an ordinance is invalid, but can be separated from the remainder which is

valid, the invalid portion may be rejected.
87 Cal. 499.

See ADVERSE POSSESSION; APPEAL; CONSTITUTIONAL LAW; DEDICATION; DEED; EVIDENCE; JUSTICES' COURTS; LICENSE; MANDAMUS; MORTGAGE; PUBLIC OFFICER; QUIETING TITLE; SAN FRANCISCO; STATUTE OF LIMITATIONS; TRUST.

TAX ASSESSOR.

See JURISDICTION; TAXATION; PUBLIC OFFICERS.

TAX COLLECTOR.

See CRIMINAL LAW; PUBLIC OFFICER.

TAX DEED.

See DEED; TAXATION.

TEACHER.

See SCHOOLS.

TELEGRAPH COMPANY.

See CORPORATIONS; CONTEMPT.

TEMPERANCE ASSOCIATIONS.

See BENEFICIAL ASSOCIATIONS; CORPORATIONS; INSURANCE.

TENANT.

See LANDLORD AND TENANT.

TENANT AT WILL.

See LANDLORD AND TENANT.

TENANT IN COMMON.

See JOINT TENANT.

TENDER.

See AGENCY; COMMON CARRIER; DEED; FRAUD; LANDLORD AND TENANT; PLEDGE; RESCISSION; VENDOR AND VENDOR.

TOLLS AND TOLL-ROADS.

Dedication of highway. 79 Cal. 166.
Repeal of franchise. 79 Cal. 166; 79 Cal. 171.
Tolls not collectible on repeal of franchise. 76 Cal. 190.
Injunctions as to. 76 Cal. 190; 79 Cal. 166.
Toll-roads are highways by dedication. 83 Cal. 239.
Pleadings in suit to quiet title to. 80 Cal. 338.

See CORPORATIONS; COUNTIES; DEDICATION; HIGHWAYS; JUSTICES' COURTS.

TORTS.

See ABATEMENT; ASSAULT AND BATTERY; DAMAGES; NEGLIGENCE; PLEADINGS; TRAFFIC; STATUTE OF LIMITATIONS.

TOWN SITE.

See PUBLIC LANDS.

TRADE-MARK.

Infringement of name of person or of thing. 68 Cal. 68; 81 Cal. 252.

TRANSCRIPT.

See APPEALS.

TRANSFER OF CAUSES.

See CHANGE OF VENUE.

TRAVELING EXPENSES.

See APPROPRIATION; PROBATE LAW.

TREASURER.

See BONDS; COUNTIES; PUBLIC OFFICERS; RAILROADS.

TREES.

See NUISANCE.

TRESPASS.

The owner of cattle in Santa Clara County is liable for their trespass, regardless of fencing. 69 Cal. 146.

A devisee in possession can maintain an action for trespass. 69 Cal. 155.

In Fresno and Tulare, actions for trespass by cattle must be begun in sixty days. 70 Cal. 482.

A tenant for years cannot maintain an action for trespass, unless he was in actual possession at the time of the trespass. 72 Cal. 371.

Instructions as to damages in malicious trespass. 75 Cal. 563.

The possession of a tenant is as complete against trespass as if he were the owner in fee. 78 Cal. 381.

A complaint for trespass alleging several correlated injuries held not demurrable for ambiguity. 78 Cal. 381; 81 Cal. 289.

Action for trespass in the diversion of waters. 78 Cal. 287.

In an action for forcible trespass, evidence of insults to plaintiff's wife, and her illness from the fright caused by the trespass, is admissible; in this case a verdict of five hundred dollars held not excessive. 81 Cal. 289.

Possession of personal property sufficient to maintain trespass against a wrong-doer. 82 Cal. 184.

See CRIMINAL LAW; DAMAGES; FALSE IMPRISONMENT; FORCIBLE ENTRY; HIGHWAYS; INJUNCTION; NEGLIGENCE; PLEADINGS; RIGHT OF WAY.

TRIAL.

See EVIDENCE; PRACTICE.

TRUSTS.

A conveyance of land to A, the purchase price being paid by B for C, who is in possession, creates a trust in favor of C. 68 Cal. 116.

A certain agreement for partition held not to constitute a trust. 70 Cal. 89.

The author of an express trust which does not provide as to whom it shall belong in case of failure or termination of trust may convey the same subject to the trust uses. 70 Cal. 326.

Where property is divided for a cemetery, and the cemetery is abolished, it should be deeded back to the original owner. 70 Cal. 326.

An answer denying the delivery of a trust deed held sufficient as a defense. 70 Cal. 361.

An express trust in personal property may be created by parol. 70 Cal. 449.

A trust, after its creation, cannot be revoked without the consent of the beneficiaries, unless such power was reserved in the declaration of trust. 70 Cal. 449.

Construction of trust deed. 71 Cal. 588.

A purchaser of land with notice of rights of a third person holds the legal title in trust for him. 71 Cal. 290.

Acquiescence in delay takes away the right to object to such delay. 71 Cal. 290.

A deed of trust given as security for a debt conveys the legal title. 71 Cal. 470.

In relation to Mexican grants. 73 Cal. 17.

Under a parol contract by which a deed was obtained in the name of A, to secure the purchase price advanced by B, held that the title was held in trust for B by A. 73 Cal. 13.

A trustee cannot purchase from himself. 73 Cal. 157.

A trustee may purchase from the beneficiary, if the transaction is fair. Adequacy of consideration is essential to fairness. 73 Cal. 157.

A tax title procured by A with money advanced by B, who is in possession, creates a resulting trust in B's favor. 74 Cal. 435.

A mining patent obtained by a trustee in his own name will be controlled in the interest of the beneficiary. 74 Cal. 435.

A mere lending of the money with which land is purchased held to create a trust in favor of the lender. 75 Cal. 166.

An express trust in land cannot be created by parol. 76 Cal. 469.

An assignment of a judgment without consideration held to be to hold it as trustee. 76 Cal. 312.

A finding that defendant took land free from any trust held supported by evidence. 76 Cal. 576.

A resultant trust arises by operation of law, and the facts creating it may be shown by parol. A party who takes the title to land paid for by another becomes the trustee of a resulting trust. 77 Cal. 91; 79 Cal. 283.

Instance of constructive trust. 77 Cal. 330.

Statute of limitations does not begin to run in favor of a trustee until he has repudiated his trust. 77 Cal. 330.

One having the legal title may sue in his own name. 77 Cal. 263.

An oral agreement to locate mining claims for joint benefit is valid, and if the location is in the name of one of the parties, he holds as trustee for the other. 77 Cal. 10. See 80 Cal. 426.

Constructive trusts under a patent for school-lands. 78 Cal. 511.

A bequest in a will, authorizing a trustee to pay money to a certain person not therein named, but known to the trustee by means of a parol understanding with the testator, is valid, and raises a constructive trust in favor of such person. 79 Cal. 420.

Construction of will as to the residuary estate. 79 Cal. 613.

Express trusts created by will. 79 Cal. 65.

Resulting trust in a mining claim. 79 Cal. 283.

Extinguishment of resulting trust. 79 Cal. 82.

A deed cannot be avoided by evidence of a parol agreement to hold in trust, except without the statute of frauds. 79 Cal. 525.

The rule still prevails that a trust results to a grantor where there is no consideration; but this does not apply where the deed recites consideration. Such a deed cannot be contradicted for the purpose of raising a resulting trust. 79 Cal. 525.

A trust held created in favor of a grantor to the right of reconveyance. 80 Cal. 426.

Where a trustee fraudulently conveys property to an innocent purchaser, he is liable for its price. 80 Cal. 426.

A conveyance from A to B to defraud creditors, under a parol agreement to reconvey, held not to constitute a legal trust. 80 Cal. 514.

Enforcement of trust; reimbursing trustee. 80 Cal. 343.

Express trust in favor of children, investments held to constitute a portion of. 80 Cal. 378.

Statute of limitations does not run in favor of a trustee until he repudiates his trust, nor while the *cestui que trust* is in possession. 80 Cal. 378.

A certain written agreement in regard to the purchase of land held to create a trust. 81 Cal. 328.

The right of a beneficiary to enforce an accounting does not rest upon fraud. 81 Cal. 328.

A business associationship analogous to a partnership constitutes a confidential relationship. 82 Cal. 351.

Both the widow and administrator of a deceased partner are proper parties defendant to a suit by a surviving partner for an accounting, and to have a trust declared. 85 Cal. 436.

An express trust relating to personal property need not be in writing, but may be shown by verbal agreement, or by the acts of the parties. 85 Cal. 436.

A resulting trust under section 853 of the Civil Code may still be an express trust. The statute of limitation will not run against the beneficiary until a repudiation by the trustee. 85 Cal. 436.

The execution and delivery of a trust deed held sufficiently shown. 85 Cal. 390.

A sale by an executor, without an order of the probate court, under a will not authorizing a sale, is void. 85 Cal. 390.

The heir of one entitled to a town-site patent can maintain a suit against his co-heir, who has obtained the town-site deed in his

own name, to enforce a trust for his share of the property. 85 Cal. 1.

A complaint for the purpose of having a trust declared in certain property, and for an injunction to restrain the sale thereof, held sufficient. 85 Cal. 177.

A conveyance upon an express trust for the benefit of certain beneficiaries vests the whole title in the trustee, both legal and equitable. 85 Cal. 488.

A surviving partner stands to the estate as a trustee. 84 Cal. 192.

In a suit by a corporation against its managing agent to declare him a trustee of certain property, an issue as to the value of the property is immaterial. 85 Cal. 623.

The general agent and manager of a corporation is not at liberty to obtain any advantage over it, by concealment from its directors of the true condition of its affairs, and it is a fraud upon it for him to secretly take part in any transaction, or to acquire any interest adverse to its interests. 86 Cal. 623.

In such a suit against such agent, no demand is necessary. 86 Cal. 623.

A finding of the court, in an action to establish a trust by one co-tenant claiming to be co-tenants with others, held proper. 86 Cal. 584.

Power and duty of trustees under the Lick trust. 86 Cal. 159.

Effect of substitution of trustee and a change of beneficiary. 86 Cal. 500.

Without the element of deceit, there can be no estoppel. 86 Cal. 500.

The position of a divorced husband as to his wife's interest in the community property held to be that of a trustee. 86 Cal. 316; 86 Cal. 171.

Trustees performing services for another without his request are not entitled to compensation. 86 Cal. 316; 86 Cal. 171.

An order substituting a trustee of an estate is a final order as between the old and new trustees. 86 Cal. 495.

Fraud as against a trustee may be sometimes shown by presumptions. 82 Cal. 357.

A *bona fide* purchaser from the holder of an illegal title, without notice of a secret or resulting trust, is not affected by it, nor by the fact that his deed was only a quitclaim conveyance. 83 Cal. 39.

Trustees are entitled to be reimbursed out of the trust property for all moneys expended for the purpose of relieving the trust property from encumbrances, and have a lien for such reimbursement. 83 Cal. 477.

An action to quiet title by a beneficiary against a trustee will not lie, but an action to enforce the trust is proper. 84 Cal. 456.

Where property is devised in trust to pay certain debts of the grantor, and the trustee conveys it to a third person, with a verbal condition that he should pay such debts, the

contract will be enforced in equity. 84 Cal. 295.

When property is deeded in trust for creditors, such trust cannot be extinguished or revoked, except by the consent of all the creditors. 84 Cal. 295.

Resulting trusts; title held as security; accounting. 80 Cal. 343.

An infant cannot avoid a deed which a court of equity would have compelled him to execute notwithstanding his infancy. 87 Cal. 552.

A constructive trust arising from fraud is not within the statute of frauds, and may be proven by parol evidence. 87 Cal. 552.

When a minor procures land to be conveyed to himself under an express promise to reconvey it to his brother when arriving at age, with the intention not to perform the promise, a constructive trust arises, which will be enforced in equity. 87 Cal. 552.

See AGENCY; APPEALS; CORPORATIONS; DEBTOR AND CREDITOR; DIVORCE; EQUITY; FALSE REPRESENTATION; FRAUD; INJUNCTION; PUBLIC LANDS; SPECIFIC PERFORMANCE; SPIRITUALISM; STATUTE OF FRAUDS.

UNCERTAINTY.

See DEMURRER.

UNDERTAKING.

See BOND.

UNDERTAKING ON APPEAL.

See APPEAL.

UNDERTAKING ON ATTACHMENT.

See ATTACHMENT.

UNDUE INFLUENCE.

Evidence held sufficient to sustain findings and judgment of cancellation. 81 Cal. 195.

See DEEDS; FRAUDS; SPIRITUALISM; WILLS.

UNIVERSITY LANDS.

Right of state to select. 71 Cal. 115.

See PUBLIC LANDS.

UNIVERSITY OF CALIFORNIA.

See HASTINGS LAW COLLEGE.

UNLAWFUL DETAINER.

Where an option of purchase is also given as an addition to a lease, and time is expressly made of the essence of the contract, limiting such option, and such option terminates by limitation, the landlord is at liberty to pursue his remedy for unlawful detainer at the expiration of the lease. 83 Cal. 559.

When a party had been wrongfully dispossessed by the court, and reinstated on appeal, the sheriff must restore him to possession regardless of who has become, in the mean time, an occupant. 83 Cal. 384.

Subdivision 1, section 1161, of the Code of Civil Procedure construed. 84 Cal. 420.

See FORCIBLE ENTRY AND DETAINER; LANDLORD AND TENANT.

USAGE AND CUSTOM.

See CONTRACTS; MECHANICS' LIENS; MINING CLAIM; WATER RIGHTS.

USE AND OCCUPATION.

See DAMAGES; EXECUTION; LANDLORD AND TENANT.

USURY.

The illegality of usury is wholly a creature of legislation. 77 Cal. 548.

VACATING JUDGMENT.

See APPEAL; JUDGMENT.

VAGRANCY.

See CRIMINAL LAW; PROHIBITION.

VALUE.

See CRIMINAL LAW; CLAIM AND DELIVERY.

VAN NESS ORDINANCE.

Title acquired by. 70 Cal. 320.

Prior possession; action against intruder; statute of limitations. 73 Cal. 529.

In deciding the question as to possession under the Van Ness ordinance, it is for the jury to decide as to whether the possession was of a character such as usually accompanies the ownership of such land. 85 Cal. 155.

Posseanio pedis involves the subjection of the land to the will of the claimant, and an actual and open occupation marked out with visible boundaries, and subjection of such land to the exclusive dominion of the occupant. It is not necessary that the land should be actually inclosed. 85 Cal. 155.

VARIANCE.

See ALLEGATA AND PROBATA; EVIDENCE; PLEADINGS; PRACTICE.

VENDOR AND VENDEE.

Mistake in contract held sufficiently pleaded. 68 Cal. 611.

Acceptance of offer contained in railroad company's circular held a valid contract of sale. 70 Cal. 484.

A contract for sale of land does not imply a license to enter. 70 Cal. 42.

Remedies of vendee against vendor for failure to execute deed. 70 Cal. 42; 70 Cal. 429.

A vendor who has received part payment cannot rescind for non-payment without returning it. 71 Cal. 226.

The want of such return, however, is no bar to a suit in ejectment, nor a proper subject for a cross-complaint. 72 Cal. 1.

A vendor's lien is waived by a personal judgment for the money due. 72 Cal. 477.

A grant operates as an assignment of a contract of sale held by the grantor. 73 Cal. 196.

Transfer of note given for purchase price when not destructive of lien. 74 Cal. 583.

Mortgage by vendee and subsequent conveyance by vendor. 75 Cal. 102.

Description of land in contract of sale. 76 Cal. 535.

Acceptance held to be in reasonable time. 76 Cal. 384.

When title to land is held to be "imperfect." 76 Cal. 177.

Title to an estate is not perfect unless probated. 76 Cal. 177.

Pleadings of vendor in a suit in ejectment. 77 Cal. 555.

Adverse possession under a contract of sale must be unequivocal and known to vendor. 77 Cal. 555.

Forfeiture clause in contract held valid. 77 Cal. 555.

The rule as to sufficiency of description of land in executory contracts for sale is extremely liberal. 78 Cal. 202.

Extent of right of rescission for fraud. 78 Cal. 202.

Duty of vendee to disclose knowledge of proposed railroad. 78 Cal. 202.

Failure to keep promise no ground for rescission of deed. 78 Cal. 126.

To sustain an action for damages for breach of contract of sale, the contract must be certain and complete. 78 Cal. 529.

A certain contract held too uncertain to be enforced, or be the basis of an action for damages. 78 Cal. 529.

A vendor who receives a deposit for the sale of land he does not own must refund. 79 Cal. 211.

Money paid as a deposit to an agent, who has paid it over to the principal, cannot be recovered back from the agent. 80 Cal. 195.

A vendor having received the deposit cannot deny the authority of the agent who turned it over to him. 80 Cal. 195.

A principal who is present, and permits an agent to contract for him, is estopped to deny the contract's validity. 80 Cal. 90.

There is no bar to the enforcement of a contract for the sale of land except the statute of limitations. 80 Cal. 90.

The doctrine of constructive notice by recording has only reference to purchasers and encumbrancers. 80 Cal. 90.

An offer to sell may be withdrawn before acceptance. 81 Cal. 42.

Charges incurred in examining a title found to be defective. 81 Cal. 214.

Qualified acceptance not legal acceptance, but a new proposal. 82 Cal. 84.

Notice of facts by intended purchaser; possession. 82 Cal. 114.

A vendee in default is liable in an action of ejectment, without demand. 82 Cal. 642; 82 Cal. 122.

Action to recover back installments. 82 Cal. 347.

Where no time is specified, reasonable time is implied. 82 Cal. 122; 87 Cal. 280.

Rescission of contract by vendor is not necessary to his suit in ejectment for default of vendee. 82 Cal. 122.

In an action by a vendor against a vendee in possession under a contract, for default in payment, the improvements of the vendee cannot be set off against the vendor's claim. 82 Cal. 122.

A purchaser cannot remain in possession of land under a contract of purchase, and at the same time refuse to pay the stipulated price. So long as he remains in possession he waives all objections to defect in title, or delay in completing it. 83 Cal. 51.

A tender of purchase-money before the time provided for payment cannot put the vendor in default for non-delivery of deed. 83 Cal. 51.

A memorandum signed by the vendor, acknowledging the receipt of a certain sum of money as a deposit on account of the sale of

land therein described, and providing that the sale should be void and the money returned if the title did not prove satisfactory, is a valid contract of sale, and not a mere option. The memorandum need not be signed by the vendee, and his payment is an acceptance of the contract by him. 87 Cal. 49.

Where money is paid on deposit on a contract of sale, conditionally, the purchaser has a lien on the property for the amount of the deposit, unless the vendee is himself in default. 87 Cal. 49.

Under a contract for the sale of land conditioned that the title should prove satisfactory to the purchaser, he is entitled to a good paper title of record. A title depending on the statute of limitations is not sufficient. 87 Cal. 49.

In a contract for a sale providing that possession would be given, the purchaser is entitled to actual possession as distinguished from the attornment of the tenants. 87 Cal. 49.

Where the transfer of possession and the payment of price are to be simultaneous, the vendor is not entitled to demand the purchase-money until delivery of possession. 87 Cal. 49.

Where a contract for the sale of land is set out *in hac verba* in the complaint, a finding that the vendor entered into the agreement upon the terms and conditions set forth in the complaint is a sufficient finding that the vendee executed the contract. 87 Cal. 489.

An allegation that the contract was obtained by fraud is covered by a finding that the contract was not obtained by fraud. 87 Cal. 489.

An averment that the vendor duly performed all the conditions of the contract to be performed by him up to the time of bringing suit is a sufficient averment of the performance of conditions precedent. 87 Cal. 489.

Under a contract for the sale of land providing a forfeiture of all rights in case the payments are not made in time, the vendor, notwithstanding such forfeiture, may sue for the amount of the purchase-money due. 87 Cal. 489.

To make time of the essence of a contract, no particular expression is necessary; it may appear from a clause making the agreement null and void if not performed within a certain time. 87 Cal. 203; 87 Cal. 275.

When time is made of the essence of a contract to convey, and the vendee defaults after cultivating the land and platting it into lots, he will not be entitled to a specific performance of the contract. 87 Cal. 203.

Where time is of the essence of the contract, and the vendor fails to execute a conveyance on time, and a demand therefor, if the vendee is without default he may rescind the contract, offer a reconveyance of his

rights to the vendor, surrender possession, and demand and recover back the installments of purchase-money paid. 87 Cal. 275.

Ambiguity in a contract of sale between the general scope and purpose, as appears from the written parts thereof and the printed portion, must be construed so as to favor the former. 87 Cal. 236.

A contract to deliver a deed within one year is sufficiently executed if such deed is tendered within three days after demand, and within eight days after the expiration of the year. 87 Cal. 236.

Where a vendor fails to execute his deed according to contract, and elects to rescind the same, the purchaser may maintain an action to recover back the installment of the purchase-money paid. 87 Cal. 443.

A stipulation in a contract that the installments paid should be taken as liquidated damages for a breach of contract is void under sections 1670, 1671, and 3307 of the Civil Code. 87 Cal. 443.

Where the facts alleged in a cross-complaint are admitted by the cross-complainant's answer in the same cause, a trial on such issues is wholly unnecessary. 87 Cal. 443.

Judgment on the pleading is proper, where the answer denies merely a conclusion of law. 87 Cal. 443.

Where a contract of sale is rescinded by the vendors, no demand is necessary to recover back from them the purchase-money paid. 87 Cal. 443.

A contract for the sale of a farm for a certain sum, and one half of so much additional as it can be resold for, does not require an actual resale to ascertain the amount of the purchase price. 87 Cal. 461.

In an action for money had and received, a nonsuit should be granted, where the evidence shows that the money was part of the purchase price of the land to be forfeited, in case further payments are not made within a limited time. 87 Cal. 221.

Where a principal ratifies the act of his agent in signing his name, he is bound by the contract. 87 Cal. 221.

The rules which apply to actions for the enforcement of executory contracts cannot be invoked to undermine an executed contract. 87 Cal. 221.

A vendor's lien is not the result of a contract therefor, but is an equity raised by the court for the benefit of the vendor after he has parted with the title. Such lien is a privilege purely personal, and is not assignable. 87 Cal. 619.

Where a vendor retains the title, he retains an express lien on the property for the purchase price unpaid. 87 Cal. 619.

The taking of security for the payment of the purchase price is a waiver of the vendor's lien, unless there is an express agree-

ment that such lien shall not be waived. 87 Cal. 619.

In an action to recover purchase-money, the court was justified in allowing the answer to be amended so as to deny a tender during the progress of the trial. 85 Cal. 518.

Where a vendor, on tender of the purchase price, refuses to convey, the vendee may treat the contract as at an end, and, without further notice of rescission, sue to recover back any purchase-money paid. 85 Cal. 518.

Where a contract for the sale of land involved the furnishing of an abstract of title by the vendor, and such abstract fails to show title, the vendee is entitled to rescind. 85 Cal. 535; 85 Cal. 110.

If a vendor has not the legal title, but is the equitable owner, through which he can secure the legal title, he will be permitted a reasonable time in which to do it, provided he uses diligence. 85 Cal. 110.

A vendor who obtains a surrender to him of his contract for sale, without notice of a resulting trust in favor of one who has advanced money for such contract, takes the land free of such trust. 86 Cal. 353.

Circumstances under which a vendor may treat a contract for sale as abandoned, and maintain his action to quiet title, without the return of the purchase-money received. 86 Cal. 353.

When a contract for the sale of land was conditioned on a perfect title, and the title proved defective, the purchaser may recover the amount of deposit made by him. 86 Cal. 538.

A title, to be good, should be free from litigation, palpable defects, and grave doubts; should consist of both legal and equitable titles, and should be fairly deducible of record. 86 Cal. 538.

Conveyance to a third party at request of purchaser will not defeat a vendor's lien for balance of purchase price. 83 Cal. 215.

The vendor does not waive his lien by taking a due-bill from the purchaser. 83 Cal. 215.

See ATTACHMENT; BROKER; EJECTMENT; FALSE REPRESENTATION; FORFEITURE; MORTGAGE; QUIETING TITLE; SALE; SPECIFIC PERFORMANCE; TRUST.

VENUE.

An action to foreclose a vendor's lien can only be commenced in the county in which the land, or some part of it, is situated. 87 Cal. 38.

An order of adoption can only be made in the county where the person adopting the child resides. 87 Cal. 640.

An action to reform a contract of sale must be tried where the land is situated. So, also, any interest or right to real property. 79 Cal. 605; 80 Cal. 308; 87 Cal. 38.

Venue in suits against corporations. 83 Cal. 468; 83 Cal. 491; 71 Cal. 488.

An action to set aside a fraudulent sale of land must be tried where the property is situated. 77 Cal. 129.

An action for an accounting, in relation to a mining partnership, need not be tried in the county where the mine is situated. 83 Cal. 181.

Where any of the defendants reside in the county, the action may be tried there. 77 Cal. 448.

See CHANGE OF VENUE; CRIMINAL LAW; JURISDICTION.

VERDICT.

Where the evidence is conflicting, the verdict will not be disturbed on the ground of being contrary to the evidence. 68 Cal. 381; 71 Cal. 552.

The court may direct a verdict where there is no conflict as to the evidence. 69 Cal. 429.

A verdict contrary to instructions is a verdict "against law." 71 Cal. 552.

Special verdict, how construed. 72 Cal. 598.

A verdict against one defendant, and silent as to the other, should be set aside. 73 Cal. 93.

A verdict will not be set aside for failure to enter judgment thereon within twenty-four hours. 75 Cal. 563.

An attack on a verdict, on the ground that it is not supported by evidence, must specify wherein the evidence is insufficient. 75 Cal. 590.

A motion for a new trial, made on a mere advisory verdict, is premature. 78 Cal. 107.

A verdict will not be set aside, as not supported by the evidence, unless, in the judgment of reasonable men, no such deduction as that expressed therein could be properly drawn from the evidence. 68 Cal. 33.

The finding of a jury on a special issue is invalid, unless signed by either the jury or its foreman. 80 Cal. 81.

See APPEALS; CRIMINAL LAW; INSTRUCTIONS; JURIES.

VERIFICATIONS.

A complaint verified by an attorney in fact is evidence against the litigant in another suit. 74 Cal. 191.

Where the answer should be verified, a motion to strike it out should be granted. 78 Cal. 118.

An attorney cannot, unless his client is absent from the county, verify on information and belief. 78 Cal. 118.

An answer to an unverified complaint by a city need not be verified. 80 Cal. 57.

See PLEADING; PRACTICE.

WAIVER.

By failure to demur specially. 69 Cal. 155.

Generally. 68 Cal. 73; 68 Cal. 156; 70 Cal. 527; 70 Cal. 553; 70 Cal. 608; 71 Cal. 555; 73 Cal. 11; 76 Cal. 269; 77 Cal. 23; 78 Cal. 389; 78 Cal. 99; 79 Cal. 323; 80 Cal. 57; 82 Cal. 420.

WAREHOUSEMAN.

A warehouseman's receipt is negotiable under the act of 1878. 68 Cal. 609.

Possession and conversion of warehouse receipt. 75 Cal. 349.

The lien of a mortgage on growing crops is not lost by the mortgagee permitting the mortgagor to store the crop in a warehouse under an agreement that it should be stored in the name of the mortgagee, although the warehouseman stored it in the name of the mortgagor. 87 Cal. 566.

A mortgagee of growing crops, who is also assignee of the warehouse receipts for the crops, may sue the warehouseman for conversion, if he delivers it to the assignee of the mortgagor in insolvency, even though the receipt was assigned on the day when the petition of insolvency was filed. 87 Cal. 556.

WARRANT.

See CONTEMPT—CRIMINAL; SEARCH-WARRANT.

WARRANTY.

Sale of good-will under. 71 Cal. 143.

Express warranty, how given. 75 Cal. 558.

See DAMAGES; INSURANCE; SALE.

WATER RIGHTS.

General doctrine of riparian rights and the laws of appropriation of water. 69 Cal. 255.

A grant of land from the United States conveys the running streams therein not previously appropriated or reserved. 69 Cal. 255.

A riparian right may be condemned for public use. 69 Cal. 255.

A riparian owner is entitled to an injunction without having obtained a judgment for damages. 69 Cal. 255.

Section 1422 of the Civil Code is not affected by the sections relating to the appropriation of water. 69 Cal. 255.

Riparian owners are entitled to a reason-

able use of the waters of a stream for irrigation. 69 Cal. 255.

The right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it as a part and parcel of it. Use does not create this right, and disuse cannot destroy it. 69 Cal. 255.

In an action for damages for the diversion of waters, injuries to land not named in the complaint cannot be considered. 68 Cal. 35.

A failure to find on the defense of five years' adverse possession of water is error. 68 Cal. 35.

A riparian proprietor has a right to protect himself by a levee as high as the original bank of the stream. 68 Cal. 569.

An appropriator having the right to the use of the waters of a stream may enter the premises and remove obstructions from such stream. 70 Cal. 591.

A riparian owner cannot restrain the use of so much of the water as is not used or appropriated by him. 70 Cal. 286.

A court of equity has power to settle conflicting claims to water rights, and to grant injunctions therein. 70 Cal. 550.

A witness experienced in measuring water, though not an expert, may testify as to the capacity of a ditch. 70 Cal. 550.

The act of May 15, 1854, relating to commissioners to regulate watercourses, construed. 70 Cal. 189.

A finding in regard to an issue as to the return of water to its natural bed held insufficient. 71 Cal. 249.

Case in which defendants were held to be the absolute owners of the waters of a lagoon. 72 Cal. 267.

The exclusion of evidence in a water-right case held error. 73 Cal. 641.

The board of supervisors cannot fix the price of water not sold to the public generally. 74 Cal. 571.

A water corporation may, by its by-laws, provide that its water shall only be sold to its own stockholders. 74 Cal. 571.

Injury to a riparian owner may be considerable without being capable of ascertainment, or of being estimated in damages. 75 Cal. 426.

A riparian owner cannot, as against a lower proprietor, authorize the water to be taken away from the stream for sale. 75 Cal. 426.

A tenant for years may secure an injunction for the unlawful diversion of the water running through his premises. 75 Cal. 426.

Prescriptive right to maintain a dam obstructing a natural watercourse. 76 Cal. 597.

The owner of a riparian right cannot dam back the water to the prejudice of a lower proprietor. 76 Cal. 597.

The fact that others besides the defendant

have unlawfully diverted the water is no defense. 76 Cal. 11; 77 Cal. 66.

An upper riparian owner can only use all the water, when necessary to the support of animal life and for domestic purposes. In all other cases he is limited to a reasonable amount. 77 Cal. 66; 80 Cal. 189.

Priority as to the right of the use of water determined by local custom and long-continued use. 79 Cal. 404.

A prior appropriator of water cannot enjoin a riparian owner from the use of water which he is not using for any beneficial purpose himself. 79 Cal. 572.

Under the act of Congress, one who diverts and appropriates water prior to the vesting of any right in a pre-emptioner becomes the owner of such water right, even though he fails to comply with the provisions of our Civil Code as to the posting and recording of his location. 80 Cal. 397.

Whether one who complies with our law could take such right away from such locator is not decided. 80 Cal. 397.

Where the settlement of a homestead claimant is subsequent to the appropriation of the water by a locator, the rights of the latter must prevail. 80 Cal. 333.

The acquisition of title to the use of water by adverse possession is governed by rules analogous to those relating to easements. 80 Cal. 181.

Where the claims of third parties are such as to require them to be made parties to the suit, in order to secure a complete determination, the court may order them to be brought in. 80 Cal. 181.

A finding as to the extent of appropriation should be specific and measured by inches or gallons. 80 Cal. 181.

There can be no riparian ownership, without a bed or channel where the water runs. 81 Cal. 289.

Water rates; authority of the board of supervisors (Spring Valley Water case). 82 Cal. 286.

Failure to post and record a notice of appropriation will not vitiate the claim in favor of the riparian rights of a subsequent settler. 82 Cal. 564.

The rights of a riparian proprietor are an appurtenance to the land, running with it as a corporeal hereditament, and cannot be extinguished by an appropriation under the statute. It may, however, be extinguished by the acquisition of a prescriptive right for the period prescribed by the statute of limitations. 85 Cal. 219.

Statutory appropriation gives notice that the appropriation is adverse, so as to set the statute of limitation in motion. 85 Cal. 219.

The adverse user of water, to constitute a prescriptive title, must be both uninterrupted and continuous for five years. 85 Cal. 219.

The right of a riparian proprietor is only to a reasonable use of the water of a stream,

in common with others in a like situation. The right to such use for irrigation is subordinate to the rights of all other riparian proprietors to the use of the waters for the supply of the natural wants of man and beast. 85 Cal. 219.

The ownership of a water-ditch is not necessarily the same as the right to the water flowing through it, and is not a necessary incident thereto. 85 Cal. 555.

When findings in favor of a prescriptive right are unsupported by evidence, the judgment will be reversed. 86 Cal. 1.

The width and depth of a ditch, without any evidence as to the grade, gives no basis for an intelligent computation. 86 Cal. 1.

A finding that the appropriation and diversion of a stream was made continuously, uninterrupted by and adversely to the defendants and their grantors, held not sustained by the evidence. 86 Cal. 1.

The mere use of water during seasons of abundance, when it naturally overflowed its channel, gives no prescriptive right to change its course in seasons of scarcity. 86 Cal. 1.

A landlord who permits water raised by artificial means to percolate through his ditch, and so injure his neighbor's land, is liable for damages. 86 Cal. 236.

The receipts of a receiver of a United States land-office is of itself *prima facie* evidence that the holder is rightfully in possession of the land therein described, and entitled to sue for the unlawful diversion of the waters of the stream therein. 87 Cal. 296.

An abandonment of a pre-emption claim defeats the right of a person claiming a water right under the pre-emption, even though he purchased for value. It seems that an appropriator of water will lose his claim to an appropriation, so far as he fails to complete the whole diversion called for by his notice of appropriation within a reasonable time. 87 Cal. 296.

If the diversion of water from a riparian owner is wrongful, it is not necessary for him to prove damages to entitle him to an injunction. 87 Cal. 296.

In an action for an injunction for the diversion of water, a finding that the diversion continued, or was threatened to be continued, is essential to support an injunction. 87 Cal. 505.

A contract for the supply of water held to entitle the defendant daily to two and one quarter inches of water, miners' measure, under a four-inch pressure. 87 Cal. 561.

Where a verbal contract is executed, under which a party built a ditch over the lands of another for a share of the right of way and water to be diverted thereby, such party obtains a vested interest therein, which may be enforced and protected by a suit in equity. 87 Cal. 126.

Where a stream is directed into a new channel, so as to affect others favorably, and the owner of land over which it flows acquiesces in such change until new rights have accrued, such acquiescence is binding, like a public dedication. 83 Cal. 84.

Water brought into a stream from another source by artificial means is held by a different title to that of riparian ownership. 83 Cal. 84.

It is essential to a prescriptive right to a ditch and dam that they should be maintained for five years under an adverse claim. 83 Cal. 84.

To constitute a watercourse, it is not necessary that the water shall run in a bed or channel of the stream all the year. 84 Cal. 12.

A cross-complaint in a suit to restrain the diversion of water held to state facts sufficient to constitute a cause for cross-complaint. 84 Cal. 585.

A judgment in a contest over riparian rights held unsupported by the findings and contrary to law. 84 Cal. 585.

See ADVERSE POSSESSION; EASEMENT; ESTOPPEL; MEXICAN GRANT; NUISANCE; PUBLIC LANDS.

WILLS.

Power of legislature to provide the form of. 68 Cal. 519.

Averment in pleading as to probate of. 71 Cal. 254.

Instructions in contest over a will as to marriage held immaterial. 72 Cal. 107.

A letter of instructions mentioned in a will is no part thereof, nor evidence in its probate. 74 Cal. 144.

Requests void for uncertainty will not invalidate a will. 74 Cal. 144.

A will will not be held invalid because the name of the testator was signed thereto by another, who does not sign his name as a witness to the signature. 74 Cal. 353.

A bequest of an undisclosed parol trust held valid. 79 Cal. 420.

Constructions of provisions in, regarding common property. 74 Cal. 365.

Advancement; specific legacies. 74 Cal. 125.

Intention of testator to dispose of entire community property; election by widow. 74 Cal. 98.

Undue influence by any one is ground for setting aside a will. 74 Cal. 52.

Indefiniteness of verdict in contest over will. 74 Cal. 52.

An absolute bequest to be distributed in a certain time creates a vested interest in fee, postponed merely in enjoyment. 73 Cal. 99.

A court will not construe a will except in a contested case properly before it. 73 Cal. 560.

"Children" construed to mean "grandchildren." 73 Cal. 594.

Annuity at discretion of executors. 73 Cal. 283.

Ornaments held to include personal jewelry. 75 Cal. 189.

"Old Ladies' Home" construed. 75 Cal. 329.

Held that the wife's half of the community property was not intended to be disposed of by the husband's will. 75 Cal. 317.

Alteration by a witness of an olographic codicil. 78 Cal. 477.

An olographic codicil may be in another person's handwriting. 78 Cal. 477.

Parol evidence as to bequests to remove uncertainty. 78 Cal. 136.

Doctrine of *cy-près*. 78 Cal. 136.

The provision of section 1575 of the Civil Code as to undue influence applies to wills. The same is true of section 1572, as to fraud. 79 Cal. 313.

A condition in a will as to a daughter becoming separated from her husband held not against public policy. 80 Cal. 452.

A promise as to the purchase of land held void for uncertainty. 81 Cal. 9.

If a testator devises to his wife half of his property, she thereby obtains one half of what he could devise; that is to say, one fourth. This makes her the owner of three fourths of the community property. 81 Cal. 240.

Exclamation of a decedent, made just before his death, is no part of the *res gesta*. 81 Cal. 241.

The term "marriage contract," as used in section 1299 of the Civil Code, does not include a post-nuptial agreement which merely purports to settle property rights between husband and wife, in view of a separation. 87 Cal. 645.

When an antenuptial will of a husband is offered for probate, the surviving wife need only show the subsequent marriage, in order to defeat the probate. The burden is then cast upon the proponent to prove a marriage contract making provision for the wife, and that such provision was intended to take the place of a testamentary provision for her. 87 Cal. 645.

Where an antenuptial will is shown to have been revoked by marriage, and no marriage contract is proven, the power of the probate court is limited to denying probate to the will, and determining who has a right to administer upon the estate; and it has no jurisdiction to inquire into any facts affecting the consideration, validity, or operation of a deed of separation between the testator and his wife. 87 Cal. 645.

The question as to the proof of a foreign will must be found by the courts of this state as a matter of fact, from the evidence, or from its authentication. 86 Cal. 93.

In the construction of a will, the intention or a testator expressed in his will must prevail. 86 Cal. 265.

A mere recommendation in a will does not make such recommendation obligatory. 86 Cal. 265.

The provisions of section 1307 of the Civil Code does not protect grandchildren from the effects of a mere omission from the will, except those who were the issue of a child who was dead at the time the will was made, and who were then presumptive heirs at law of the testator. 86 Cal. 441.

The trustees appointed under a will, who have sued to obtain a construction of certain clauses of the will, are not aggrieved by an order of the court allowing the attorney and guardian *ad litem* for the minor heirs a fee for his services. 83 Cal. 420.

Evidence of the declarations of the testator as to his intention to omit any of his children from his will is not admissible. The words of the will must show that the testator had the child in mind, and must indicate directly, or by implication equally as strong, that he intended to omit such child from the will. 83 Cal. 322.

The tearing off of the signature from an olographic will, with intent to cancel it, held sufficient evidence to sustain a verdict. 82 Cal. 420.

Waiver of irregularities in contest over a will. 82 Cal. 420.

See APPEAL; EVIDENCE; ELECTION; GUARDIAN AD LITEM; INSOLVENCY; PROBATE LAW; SPIRITUALISM; TRUST.

WITNESSES.

See EVIDENCE.

WITNESS FEES.

A party who attends a trial, and when there, is called as a witness, is not entitled to witness fees or mileage. 72 Cal. 451.

WRIT OF ASSISTANCE.

A writ of assistance is a summary proceeding which a party who purchases under the foreclosure of a mortgage in his favor may sometimes advantageously avail himself of; but such proceedings are not *res judicata* as to any questions that may arise, and a right to the writ does not deprive the party of the fuller remedy afforded by the ordinary action of ejectment. 83 Cal. 353.

WRIT OF ERROR.

A writ of error from the United States supreme court, in relation to the disbarment of an attorney, does not operate to supersede the order of suspension. 72 Cal. 290.

WRIT OF REVIEW.

See CERTIORARI.

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